Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

JOHN K. BALDWIN,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE NORTHERN MARIANA ISLANDS,
Respondent.

UNITED STATES OF AMERICA,
Real Party in Interest.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erroneously applied a *per se* rule that the failure to demand a jury trial due to excusable neglect is not curable, contrary to the plain language of FEDERAL RULE OF CIVIL PROCEDURE 39(b) and the varying – though universally more lenient – standards applied in eleven other circuits.

2. Whether the Ninth Circuit committed plain error by refusing to grant a writ of mandamus to protect the right to trial by jury when the District Court erroneously required the jury demand to be both served and filed within ten days of the answer, contrary to FEDERAL RULE OF CIVIL PROCEDURE 38(b)(2), which allows filing a reasonable time after service.

PARTIES TO THE PROCEEDING

Petitioner John K. Baldwin is a resident of the Commonwealth of the Northern Mariana Islands. He is the plaintiff in the United States District Court for the District of the Northern Mariana Islands, and was the petitioner in the United States Court of Appeals for the Ninth Circuit.

Respondent is the District Court for the District of the Northern Mariana Islands (the "District Court"), which was also respondent in Petitioner's proceeding below in the United States Court of Appeals for the Ninth Circuit, for a writ of mandamus.

The real party in interest is the United States, which is the defendant in the District Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John K. Baldwin respectfully petitions for a writ of certiorari to review an order of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Court of Appeals' order denying the petition below, for a writ of mandamus to the District Court, is unpublished. (App. 1). The petition for a writ of mandamus arose out of a tax refund proceeding in the United States District Court for the District of the Northern Mariana Islands, in which the District Court granted the defendant United States' motion to strike Petitioner's jury demand. The opinion of the District Court below is unpublished. (App. 2-6). Following the Court of Appeals' denial of mandamus, the Petitioner filed a petition for panel reconsideration and reconsideration *en banc*. The Court of Appeals' order denying the petition for reconsideration is unpublished. (App. 7).

STATEMENT OF JURISDICTION

The Court of Appeals' order denying reconsideration was entered on July 8, 2010. (App. 7). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The U.S. CONSTITUTION, amend. VII provides, in relevant part:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

FED. R. CIV. P. 5 provides,[1] in relevant part:

Rule 5. Serving and Filing Pleadings and Other Papers

(d) Filing.

(1) Required Filings; Certificate of Service. Any paper after the complaint that is required to be served – together with a certificate of service – must be filed within a reasonable time after service.

FED. R. CIV. P. 6 provides, in relevant part:

Rule 6. Computing and Extending Time; Time for Motion Papers

(b) Extending Time.

(1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

FED. R. CIV. P. 38 provides, in relevant part:

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[1] All references to the Federal Rules in this petition refer to the rule in force during the time period relevant to the proceeding below, and prior to the most recent amendment of the Federal Rules, effective December 1, 2009.

Rule 38. Right to a Jury Trial; Demand

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution – or as provided by a federal statute is preserved to the parties inviolate.

(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand – which may be included in a pleading – no later than 10 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

FED. R. CIV. P. 39 provides, in relevant part:

Rule 39. Trial by Jury or by the Court

(b) When No Demand Is Made. Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.

STATEMENT OF THE CASE

This Court was once able to observe that, "as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver."[2] This is not the case in the Ninth Circuit.

In the Ninth Circuit, a party that has inadvertently failed to make a timely demand for a jury trial has no avenue for relief, regardless of the circumstances or excusability of such neglect, the lack of prejudice, or any of the circumstances typically relevant to a late request for a jury trial.[3] Under the plain terms of the Federal Rules and the caselaw in each of the eleven other circuits to have considered the issue, a more lenient standard applies. While the standards applied in those other circuits are varied and in conflict with each other, as well as with the standard in the Ninth Circuit, Petitioner's supposedly late demand for a jury trial would have been granted under *any* of those standards. Only under the Ninth Circuit's erroneous *per se* rule was it inevitable that Petitioner's request be denied.

Rule 38(b) requires that a jury demand be served and filed. Rule 38(b)(1) allows service within ten days of the answer, and Rules 38(b)(2) and 5(d) allow filing within a reasonable time thereafter. In cases such as this case, where the parties consent to electronic service

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[2] *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

[3] *Pac. Fisheries Corp. v. HIH Cas. & Gen'l Ins., Ltd.*, 239 F.3d 1000, 1002 (9th Cir. 2001) (emphasis added).

and filing (App. 40-45), Rule 5(b)(2)(E) provides that service is complete upon transmission.

Because of a technical failure that was inadvertently not caught, Petitioner's Complaint did not include the intended jury demand. (App. 3, 34-35). Even before discovering the error in the Complaint, however, Petitioner nonetheless gave timely notice to the defendant United States that he intended to have his case heard before a jury, by serving a proposed Case Management Plan on counsel for the United States (App. 8-17), reciting his belief that "[t]his is a jury case." (App. 14). This notice that a jury trial was being sought was (a) served electronically on counsel for the United States on November 9, 2009, *within the time period specified in Rule 38(b)(1)*, and (b) filed with the District Court 5 days later, on November 14, 2009, within the "reasonable time" after filing required by Rule 38(b)(2) and Rule 5(d). (App. 18-30, 35-37).

In addition, immediately upon learning that the jury demand had inadvertently been omitted from the Complaint, Petitioner also served and filed a supplemental, formal jury demand, on November 11, 2009. (App. 31-32). Thus, Petitioner timely served and timely filed notice of a jury demand via the proposed case management plan, and filed and served a second, supplemental free-standing formal jury demand two days after the Rule 38(b) deadline. (App. 4, 18-30, 31-32, 35-37).

Despite such filings, the defendant United States filed a motion to strike Petitioner's jury demands, which the District Court granted, on January 22, 2009. (App. 2-6). Regarding the proposed case management

plan, the District Court erroneously held that the electronic transmission of the proposed case management plan was not "service" of that plan, that to the extent it was service, it was not *filed* with the court within ten days, and that the proposed case management plan was not the type of document that qualified as a document "filed with the court" in any event. (App. 5). Each of those findings was clearly erroneous.

Having mistakenly concluded that Petitioner's jury demand was untimely, the district court then considered whether a jury trial nonetheless should be ordered under Rule 39(b), which explicitly allows the court to order a jury trial even where a timely demand has not been made.[4] The District Court cited Ninth Circuit precedent for the proposition that a jury trial *cannot* be ordered "when the failure to make a timely demand results from an oversight or inadvertence." (App. 5). The court therefore refused to consider whether Petitioner's supplemental demand, filed two days late, could be excused under either Rule 39(b) or Rule 6(b), both of which give a court discretion to excuse any late filing that is the result of "excusable neglect."[5] (App. 5-6).

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[4] FED. R. CIV. P. 39(b) ("Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.").

[5] FED. R. CIV. P. 6(b) ("When an act may or must be done within a specified time, the court may, for good cause, extend the time: . . . on motion made after the time has expired if the party failed to act because of excusable neglect.").

Petitioner promptly filed a petition with the United States Court of Appeals for the Ninth Circuit, seeking a writ of mandamus directing the District Court to reinstate the jury demand. The Ninth Circuit summarily denied this petition on April 13, 2010, without elaborating upon the grounds for denial. (App. 1).

Petitioner next filed a petition for panel reconsideration and reconsideration *en banc*, raising the applicability of this Court's holdings under Rule 6(b) to jury demands, and pointing to conflicts with prior Ninth Circuit case law, the law in other circuits, and the patent impropriety of the District Court's ten day service-and-filing requirement, which is flatly contradicted by Rules 5(d) and 38(b)(2). This reconsideration petition was summarily denied, on July 8, 2010, again without addressing the Petitioner's arguments. (App. 7).

REASONS FOR GRANTING THE PETITION

No fewer than twelve United States district courts and one circuit court have acknowledged the existence of a widespread circuit conflict regarding whether jury demands that are untimely because of excusable neglect may be allowed under Rule 39(b), as well as the fundamental nature of the right affected by this conflict.[6] This split has percolated in the federal

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[6] *See Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 199-200 (1st Cir. 1987) (dividing the approaches of its sister circuits into two camps, and rejecting both approaches) (citations omitted); *Nibbi Bros., Inc. v. Nat'l Union Fire Ins. Co.*, No. C-09-2231 EMC,

judiciary for four decades, with the first opinion addressing the circuit conflict appearing thirty-eight years ago, and the most recent in January of this year.[7] In case after case, district courts have implicitly sought

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2010 U.S. Dist. LEXIS 8940, at *3 (N.D. Cal. Jan. 21, 2010) ("there is a conflict") (citations omitted); *Ruiz v. Rodriguez*, 206 F.R.D. 501, 504-05 & n.2 (E.D. Cal. 2002) (citing conflicting decisions of eleven federal circuits to conclude that "[a] wide divergence of opinion exists among the Circuit Courts of Appeal . . . under Rule 39(b).") (citations omitted); *Credit Bureau of Council Bluffs, Inc. v. Credit Bureau Data Ctrs., Inc.*, 143 F.R.D. 206, 212 n.3 (S.D. Iowa 1992) ("There appears to be a split in the United States Court of Appeals[.]"); *Orlowski v. TRW, Inc.*, 765 F. Supp. 1277, 1278 (E.D. Mich. 1991) (dividing four federal circuits into two camps); *Clark v. Imarflex Mfg. Co., Ltd.*, No. 85 C 8184, 1986 U.S. Dist. LEXIS 18551, at *11 (N.D. Ill. Oct. 24, 1986) (*citing Rodriguez v. Schweiger*, 534 F. Supp. 229, 231 (N.D. Ill. 1982)); *Danmar Assocs. v. Porter*, 43 B.R. 423, 435 (D. Conn. 1984) ("There is a wide divergence of views on how a court should exercise the discretion contemplated by Rule 39(b).") (citations omitted); *Rodriguez*, 534 F. Supp. at 231 (N.D. Ill. 1982) ("There appears to be considerable conflict among the circuits as to the standard by which a district court should exercise its discretion[.]") (citations omitted); *Herman v. NBC, Inc.*, No. 80 C 2207, 1982 U.S. Dist. LEXIS 11712, at *2-4 (N.D. Ill. Apr. 9, 1982) (same); *Cascone v. Ortho Pharm. Corp.*, 94 F.R.D. 333, 335 (S.D.N.Y. 1982) (taking note of the Rule 39(b) standard imposed by the Second Circuit, but deciding to instead apply the Fifth Circuit standard, because it is the "better and more timely modern rule") (citations omitted); *Pawlak v. Metro. Life Ins. Co.*, 87 F.R.D. 717, 719 (D. Mass. 1980) ("There is considerable conflict[.]"); *Hawkinson v. Blandin Paper Co.*, 54 F.R.D. 517, 519 (D. Minn. 1972) (citing decisions in three circuits to conclude that, already in 1972, "the courts have split on the issue[.]") (citations omitted).

[7] *Nibbi*, No. C-09-2231 EMC, 2010 U.S. Dist. LEXIS 8940, at *3 (discussing the split in an opinion dated January 21, 2010); *Hawkinson*, 54 F.R.D. at 519 (same, in an opinion dated 1972).

guidance from this Court, citing the "wide divergence of views" in the circuit courts on how a court should exercise its discretion under Rule 39(b).[8]

Such a broad, enduring, and well-recognized circuit conflict on a recurring issue of constitutional magnitude makes the protection of the constitutional right to a jury trial subject to the vagaries of geography and circuit inclination. Both as a matter of conflicting decision among the circuits and as a matter of supervising the administration of the courts in their treatment of such a fundamental aspect of the judicial system, this issue calls for intervention and remedy by this Court.

The tradition of trial by jury is among the most hallowed in our courts. The right to a jury trial in civil proceedings predates the Bill of Rights in which it is enshrined.[9] The Framers of our Constitution, who considered the jury box to be the bulwark of our legal tradition, "carried this concern from England, in which the right to a jury trial had been enshrined since the Magna Carta."[10] Indeed, much more so than the

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[8] *E.g.*, *Ruiz*, 206 F.R.D. at 504-05 & n.2; *Danmar Assocs.*, 43 B.R. at 435; *Rodriguez*, 534 F. Supp. at 231.

[9] U.S. CONST. amend.VII; Magna Carta (Confirmed version), 9 Henr. III, 1225, C. 29.

[10] *United States v. Booker*, 543 U.S. 220, 239 (2005). The Magna Carta, which is the direct ancestor of our Constitution, included the following provision: that no free man be harmed, either in his person or property, "*nisi per legale judicium parium suorum*" . . . (meaning save by the lawful judgment of his peers). Magna Carta (Confirmed version), 9 Henr. III, 1225, C. 29. What is striking about this provision is that, from its very inception, the

remainder of the Bill of Rights, the jury right lies at the very foundation of our legal system, having shaped the rules of civil and criminal procedure and the rules of evidence that guide our courts.[11]

A. The Court Should Grant Certiorari to Resolve the Long-Standing Division in the Federal Circuits Concerning the Degree of Protection Properly Afforded a Jury Demand Under Rules 39(b), and 6(b).

Because "the federal policy favoring jury trials is of historic and continuing strength,"[12] there should be a clear and consistent standard in the federal circuits for determining when an untimely jury demand is allowed under Federal Rules 39(b) and 6(b). Although there are certainly competing interests at stake in terms of prompt notice, the efficient administration of the judicial system, and the consequences of supposedly untimely exercises of constitutional rights, those competing demands are expressly and sensibly taken into account in the Federal Rules themselves. While a failure to demand a jury trial can indeed waive that

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right to jury trial has placed a check not only on the government's ability to imprison, harm or put to death its subjects, but also to invade their *libero tenemento*, or freehold – their property interests. *Id.*

[11] Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987, 1007 *passim* (1990) (explaining how American procedure and rules of evidence developed from, and are inextricably married to, the Anglo-Saxon system of trial by jury).

[12] *AMF Tuboscope, Inc. v. Cunningham*, 352 F.2d 150, 155 (10th Cir. 1965) (citation omitted).

right, the rules expressly recognize the harshness of such a waiver where it has occurred through mere inadvertence, and provide standards for excusing such inadvertent neglect.

In the Ninth Circuit, however, in the case of jury waivers caused by inadvertence, there is no recognition of such competing interests, but rather an elevation of form over substance and a *per se* rule that refuses to consider the circumstances and the genuine judicial and party interests in the preservation of a party's right to a jury trial. In the remaining circuits, the interaction between the competing interests – the jury right, the notice right, and due regard for judicial discretion – has resulted in an array of materially different standards being adopted over the years. These standards differ not merely in form but in substance. The necessary result is that jury trials will be easier to obtain in some federal circuits than in others. But only the Ninth Circuit prohibits its district courts from honoring supplemental jury demands like the one at issue here.

In *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993) ("*Pioneer*"), this Court granted certiorari to resolve a split on a similar question of procedure – the standard for allowing late filings under the excusable neglect test of Rule 6(b).[13]

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[13] *Pioneer*, 507 U.S. at 387 & n.3 (describing and resolving the split shown by the "narrow view of 'excusable neglect'" under Rule 6(b) taken by the Fourth, Seventh, Eighth and Eleventh Circuits – requiring a showing that the delay was caused by circumstances beyond movant's control – with the "flexible analysis" applied by

The standard adopted by this Court for Rule 6(b), applicable to all filings not excluded[14] – and therefore applicable to a jury demand under Rule 38 – was far more lenient than the unforgiving standard applied by the Ninth Circuit to the constitutionally favored filing of a demand for a jury trial. This Court should likewise grant certiorari review here to resolve a similar split in the circuits regarding the test for allowing an untimely jury demand. Alternatively, this Court could (1) remand for reconsideration in light of the application of Rule 6(b) and *Pioneer* to the issue of whether to recognize an untimely jury demand, or (2) summarily reverse, as addressed in Section B below, because the Ninth Circuit was required to grant a writ of mandamus to vacate the District Court's patently erroneous order striking Petitioner's timely-filed jury demand.

1. The Ninth Circuit Denies District Courts Any Discretion to Grant Relief When the Failure to Make a Timely Jury Demand Results From Oversight or Inadvertence.

Unlike all of the other circuits, in the Ninth Circuit, discretion to grant an untimely jury demand under Rule 39(b) is "narrow . . . and *does not permit* a court to grant relief when the failure to make a timely demand

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the Tenth and Sixth Circuits that the Court adopted as the correct approach).

[14] *Id.* at 389 n.4 (admonishing that Rule 6(b) is "generally applicable to any time requirement found elsewhere in the rules unless expressly excepted").

results from an oversight or inadvertence."[15] The Court of Appeals has been consistent and explicit on this point; in the Ninth Circuit, "[a]n untimely request for a jury trial demand *must* be denied unless some cause beyond mere inadvertence is shown."[16] Indeed, the restrictive precedent in the Ninth Circuit is so well entrenched that the Court of Appeals apparently found no need to provide an opinion in this case, and the District Court simply applied extant and binding precedent, ignoring the parties' discussion of Rule 6(b) entirely.

As a practical matter, the Ninth Circuit imposes a requirement that the failure to timely file a jury demand result from a cause beyond the movant's control. In *Pioneer*, this Court expressly rejected, in construing Rule 6(b), a standard for relief that would have required the movant's untimely filing to have been the result of factors beyond his control.[17] Rather,

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[15] *Pac. Fisheries Corp. v. HIH Cas. & Gen'l Ins., Ltd.*, 239 F.3d 1000, 1002 (9th Cir. 2001) (*citing Lewis v. Time Inc.*, 710 F.2d 549, 556-57 (9th Cir. 1983); *Chandler Supply Co. v. GAF Corp.*, 650 F.2d 983, 987-88 (9th Cir. 1980)) (emphasis added).

[16] *Pac. Fisheries*, 239 F.3d at 1002 (*citing Mardesich v. Marciel*, 538 F.2d 848, 849 (9th Cir. 1976); *Russ v. Standard Ins. Co.*, 120 F.3d 988, 989-90 (9th Cir. 1997); *Kletzelman v. Capistrano Unified Sch. Dist.*, 91 F.3d 68, 71 (9th Cir. 1996); *Wall v. Nat'l R.R. Passenger Corp.*, 718 F.2d 906, 910 (9th Cir. 1983)) (emphasis added).

[17] *Pioneer*, 507 U.S. at 388, 395, & 395 nn.13, 14 (rejecting the notion that the reason for the late filing should be the only, or even predominant, factor in deciding whether to accept an untimely filing under Rule 6(b)). As this Court noted, to commit neglect is "'to give little attention or respect' to a matter, or, closer to the

whether the delay was beyond movant's control *is only one of several factors to be considered*, including:

> . . . the danger of prejudice to the [defendant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.[18]

The Ninth Circuit thus goes further than any other Court of Appeals in limiting the right to trial by jury under an expansive doctrine of inadvertent waiver. Indeed, jury demands are given less protection in the Ninth Circuit than any other untimely filing, because the Ninth Circuit does not apply Rule 6(b)'s "excusable neglect" standard to late jury demands.[19]

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point for our purposes, 'to leave undone or unattended to *esp[ecially] through carelessness*.'" *Id.* at 388 (citations omitted and emphasis in original). Therefore, in enacting Rule 6(b), "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness." *Raymond v. IBM Corp.*, 148 F.3d 63, 66 (2d Cir. 1998) (*citing Pioneer*).

[18] *Pioneer*, 507 U.S. at 395.

[19] *Pac. Fisheries*, 239 F.3d at 1002 (no discussion of Rule 6(b)). Accordingly, the District Court ignored plaintiff's reference to Rule 6(b) as an alternative basis to Rule 39(b) to allow an untimely jury demand. (App. 5-6).

2. Eleven Other Circuits Apply More Lenient, Although Varying, Standards, Any of Which Would Have Led to a Different Result in This Case.

a. In the Second Circuit, While District Courts Have No Discretion to Grant Relief Under Rule 39(b) When the Failure to Make a Timely Jury Demand Results from Oversight or Inadvertence, Courts May Grant Relief Under Rule 6(b).

The Second Circuit has an entirely different approach. While the circuit has long held to a rigid waiver standard under Rule 39(b), similar to that applied by the Ninth Circuit,[20] after this Court's ruling in *Pioneer*, the Second Circuit reached an entirely different result under Rule 6(b).[21] Thus, the Second Circuit has concluded that, while a purely inadvertent waiver must be allowed to stand under Rule 39(b), Rule 6(b) requires a court to consider whether the waiver should be forgiven if it is a result of "excusable

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[20] *E.g.*, *Noonan v. Cunard S.S. Co. Ltd.*, 375 F.2d 69, 70 (2d Cir. 1967) ("[I]nadvertence in failing to make a timely jury demand does not warrant a favorable exercise of discretion under Rule 39(b)[.]").

[21] *Raymond v. IBM Corp.*, 148 F.3d 63, 66 (2d Cir. 1998) (affirming district court order allowing untimely jury demand even though it resulted from "mere inadvertence" because delay was not a result of bad faith conduct, and there was no prejudice to court calendar or adverse party) (*citing Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993)).

neglect" and there is an absence of prejudice to the court and adverse parties.[22]

In concluding that a strict doctrine of inadvertent waiver is inconsistent with the holding of *Pioneer*, the Second Circuit recognized that there is nothing in the language of Rule 6(b) that suggests it should not apply to untimely jury demands.[23] Rather, the Second Circuit observed, the "plain text of Rule 6(b)(2) suggests that the rule is meant to apply to the time constraint imposed by Rule 38(b)."[24] Thus, all of the federal circuits that allow untimely jury demands to be struck solely because of the demanding party's neglect are essentially ignoring the import of this Court's holding in *Pioneer*, which only the Second Circuit seems to have recognized.

Under the excusable neglect standard articulated by this Court in *Pioneer* and employed in the Second Circuit in the jury demand context, Petitioner likely would have been afforded a jury trial because of his prompt demand, the lack of prejudice to the defendant and the court calendar, and the prejudice to Petitioner in losing his right to a jury trial when he pre-paid $5 million in disputed taxes in order to secure that right.[25]

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] 28 U.S.C. § 2402 (stating that "any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury."). Section 1346(a)(1) gives U.S. District Courts jurisdiction over "[a]ny civil

b. The Seventh and Eighth Circuits Require District Courts to Err on the Side of Accepting Untimely Jury Demands.

The Seventh Circuit has adopted a standard that most fully recognizes that a decision under Rule 39 is affected by the importance of the Seventh Amendment.[26] In *Merritt v. Faulkner*, the Seventh Circuit referenced the importance of the right to a jury trial and concluded that, because "[a] jury trial is not a minor feature of our judicial system," an untimely jury demand *must* be granted "[i]n the absence of strong and compelling reasons to the contrary,"[27] citing *both* Rule 39(b) and Rule 6(b).[28]

In a relatively recent review of *Merritt*, the Seventh Circuit characterized the "strong and compelling" standard as a directive to district courts to "approach each application under Rule 39(b) with an open mind and an eye to the factual situation of the particular case, rather than with a fixed policy."[29] The court

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action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected[.]" 28 U.S.C. § 1346(a)(1). The Petitioner's action in the U.S. District Court for the District of the Northern Mariana Islands is a section 1346(a)(1) proceeding, and Petitioner specifically opted to file such a proceeding, and pay his taxes in advance, in order to have the benefit of a jury trial. (App. 39).

[26] *Merritt v. Faulkner*, 697 F.2d 761, 766 (7th Cir. 1983).

[27] *Id.* at 766, 767 & n.7.

[28] *Id.* at 767 n.7.

[29] *Members v. Paige*, 140 F.3d 699, 703 (7th Cir. 1998).

likened the appropriate review to that exercised in determining whether a motion to amend the complaint should be entertained after the power to do so of right has expired.[30] Significantly, the court found that the appropriate standard was not even as high a hurdle as the excusable neglect standard,[31] suggesting that good faith and lack of prejudice to a respondent may alone carry the day in deciding whether to grant relief to a movant.[32]

Likewise, the Eighth Circuit has cautioned that courts must "approach each application under Rule 39(b) with an open mind . . . and that jury trials ought to be liberally granted when no prejudice results . . . ."[33]

Under the "open mind" standard in the Seventh and Eighth Circuits, factors such as the timely notice in the proposed Case Management Plan of Petitioner's desire for a jury trial, the lack of prejudice to the defendant,

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[30] *Id.* at 704.

[31] *Id.* at 703.

[32] *Id.* at 704.

[33] *Littlefield v. Fort Dodge Messenger*, 614 F.2d 581, 585 (8th Cir. 1980) (rejecting untimely demand because it appeared to be part of "a pattern of conduct apparently intended to delay trial"). In the Eighth Circuit, a plaintiff who realizes that it has failed to make a timely jury demand has another remedy. If the requirements of FED. R. CIV. P. 41(a)(2) are met, a plaintiff can dismiss its case and start over, making a timely jury demand. *Hoffman v. U.S. Steel Corp.*, 596 F.2d 822, 823 (8th Cir. 1979). By contrast, the Second and Ninth Circuits have rejected parties' efforts to use Rule 41 to avoid the consequences of untimely jury demands. *Russ v. Standard Ins. Co.*, 120 F.3d 988, 990 (9th Cir. 1997); *Noonan v. Cunard S.S. Co., Ltd.*, 375 F.2d 69, 71 (2d Cir. 1967).

the prompt filing of the supplemental demand, and Petitioner's prepayment of $5 million to litigate before a jury in district court rather than without a jury in tax court, surely would have resulted in the recognition of Petitioner's jury demand.

c. The Third, Fourth, Eleventh, and D.C. Circuits Employ a Balancing Test.

The Third, Fourth, Eleventh, and D.C. Circuits have each adopted a standard that requires courts to consider factual circumstances similar to those analyzed under the Seventh Circuit standard. Specifically, these circuits have approved consideration of the following factors in determining whether to grant an untimely jury demand:

> 1) whether the issues are suitable for a jury; 2) whether granting the motion would disrupt the schedule of the Court or the adverse party; 3) whether any prejudice would result to the adverse party; 4) how long the party delayed in bringing the motion; and 5) the reasons for the failure to file a timely demand.[34]

Had the question of whether to allow Petitioner's supplemental jury demand been governed by the balancing tests used in the Third, Fourth, Eleventh,

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[34] *S.E.C. v. Infinity Group Co.*, 212 F.3d 180, 196 (3d Cir. 2000); *accord BCCI Holdings (Lux.), S.A. v. Kahlil*, 214 F.3d 168, 173 (D.C. Cir. 2000) (*citing Pierce v. Underwood*, 487 U.S. 552, 562 (1988)); *Malbon v. Pa. Millers Mut. Ins. Co.*, 636 F.2d 936, 940 (4th Cir. 1980) (citations omitted); *Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th Cir. 1983).

and D.C. Circuits, he would have been afforded a jury trial because: (1) the issues are suitable for a jury; (2) the supplemental jury demand was made before a trial was set or discovery was taken; (3) the timely notice of plaintiff's desire for a jury trial precluded any prejudice to defendant; (4) Petitioner made his supplemental formal jury demand immediately upon discovering the error, within two days of the deadline; and (5) the original failure to make a timely demand in the complaint was a word processing error that briefly went unnoticed, rather than a result of indifference or a tactical decision. (App. 34-35).

d. Four Circuits Have Adopted Neither a Strict Nor a Liberal Standard, Instead Vesting Wide Discretion in the Trial Court.

The four remaining circuits do not appear to use a balancing test. Rather than striking a balance between notice requirements and deference to the Seventh Amendment jury right, the First, Fifth, Sixth, and Tenth Circuits prioritize giving wide deference to the trial court, regardless of whether the trial court grants or denies a Rule 39(b) motion.[35] This approach was

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[35] *Andrews v. Columbia Gas Transmission Corp.*, 544 F.3d 618, 632 (6th Cir. 2008) ("A district court has broad discretion in deciding whether to grant a Rule 39(b) motion.") (citations omitted); *Nissan Motor Corp. v. Burciaga*, 982 F.2d 408, 409 (10th Cir. 1992) (per curiam); *Farias v. Bexar County Bd. of Trs. for Mental Health Retardation Servs.*, 925 F.2d 866, 873 (5th Cir. 1991); *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 200 (1st Cir. 1987).

perhaps most clearly set out by the First Circuit, when it stated that "[w]e are of the view that the discretion under Rule 39(b) is very broad and that the case would be very rare indeed where a district court abused its discretion in denying or granting a Rule 39(b) motion."[36] "The consequence [of this approach], particularly in a multijudge district," is "that the substantial [constitutional] rights of the parties would depend on the accident of the calendar – in stark violation of the memorable admonition, 'It will not do to decide the same question one way between one set of litigants and the opposite way between another[.]'"[37]

Because this deferential approach does give district courts wide discretion to deny or grant Rule 39(b) motions, however, under this "full discretion" standard, Petitioner could have been afforded the jury trial that the District Court denied below, because the District Court found that, under the Ninth Circuit standard, it had *no* discretion to grant a jury trial when the original failure to make the demand was inadvertent. (App. 5-6). Indeed, in every circuit other than the Ninth, the more lenient standard employed to evaluate whether to grant relief from inadvertent jury waivers has resulted in relief being granted in circumstances similar to

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[36] *Rowlett*, 832 F.2d at 200.

[37] *S.E.C. v. Am. Trailer Rentals Co.*, 379 U.S. 594, 620 (1965) (rejecting use of an "open-ended discretion" standard for certain determinations because of the potential for inconsistent rulings) (quoting CARDOZO, *The Nature of the Judicial Process* 33 (1921)).

those here,[38] and even in much less compelling circumstances.[39]

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[38] *E.g., Raymond v. IBM Corp.*, 148 F.3d 63, 66 (2d Cir. 1998) (affirming district court order granting an untimely jury demand despite an inadvertent waiver); *Merritt v. Faulkner*, 697 F.2d 761, 766 (7th Cir. 1983) (reversing district court and remanding with instructions to hold jury trial); *Rowlett*, 832 F.2d at 200 (affirming district court order allowing late jury demand when counsel erroneously thought one had previously been made); *Wal-Mart Stores, Inc., v. PDX, Inc.*, No. 4:09-cv-0870 AGF, 2009 U.S. Dist. LEXIS 93521, at *3-4 (E.D. Mo. Oct. 7, 2009) (following Eighth Circuit's "lenient" test, allowing three month late jury demand because trial over 16 months away); *Kapila v. MTV Networks (In re Pearlman)*, No. 6:10-cv-181-Orl-28DAB, 2010 U.S. Dist. LEXIS 88873, at *9-10 (M.D. Fla. Aug. 27, 2010) (citing Eleventh Circuit rule that jury trial should be granted in absence of compelling reasons to the contrary and allowing late demand when trial a year away); *Smith v. Estes Express*, No. 3:09-cv-574, 2009 U.S. Dist. LEXIS 10684, at *7 (E.D. Va. Feb. 12, 2009) (factual nature of dispute and lack of prejudice to court calendar and adverse party favored granting jury demand made three months late); *Harvey v. Adams Co. Sheriff's Office*, No. 04-cv-01090-BNB-CBS, 2008 U.S. Dist. LEXIS 46389, at *6 (D. Colo. June 4, 2008) (late jury demand granted because issues within competence of jury and ample time to prepare for trial avoided prejudice and no strong and compelling reason to deny); *Kelley v. Old Mut. Fin. Network Sec., Inc.*, No. 3:10-cv-1261-L, 2010 U.S. Dist. LEXIS 97132, at *3-4 (N.D. Tex. Sept. 15, 2010) (granting a Rule 39(b) motion because "[t]he case is in its earliest stages, there is no legal prejudice to Defendants, and Plaintiff's failure to file a jury demand was an honest mistake by her counsel.").

[39] *E.g., Game On Ventures, Inc. v. Gen. RV Ctr., Inc.*, Case No. 08-12052, 2009 U.S. Dist. LEXIS 9324, at *4 (E.D. Mich. Feb. 9, 2009) (granting a Rule 39(b) motion made two and one-half months before trial when plaintiff had orally informed defendant that jury trial sought after receipt of scheduling order indicating bench trial set); *O'Brien Oil Pollution Serv. v. Kapoor*, No. 06-cv-02945 (DMC), 2008 U.S. Dist. LEXIS 50624, at *4 (D.N.J. June 26, 2008) ("A

The fact that the Ninth Circuit's decisions below are unpublished is immaterial to this proceeding, because published opinions on the precise issues involved have issued from all twelve federal circuits during the many decades that this circuit split has persisted. The case law is in such disarray that one district court refused to follow its local court of appeals, on the grounds that the court of appeals' decisions conflict with this Court's jurisprudence.[40] Such conflicts, both within and among the circuits, require this Court's intervention and resolution.

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delay of two years is somewhat substantial, but again considering that no trial date has yet been scheduled, the delay is not so egregious to merit a denial of the [Rule 39(b)] motion."); *Kenilworth Trash Co. v. Eastern Waste Indus., Inc.*, 139 F.R.D. 247, 249 (D.D.C. 1991) (when circumstances made it clear plaintiff sought jury trial from the start, court allowed late demand and adjourned imminent trial setting for two months so parties could adjust planning for jury trial).

[40] *Cascone v. Ortho Pharm. Corp.*, 94 F.R.D. 333, 337 (S.D.N.Y. 1982) (refusing to follow the Second Circuit's Rule 39(b) standard set forth in *Noonan v. Cunard S.S. Co., Ltd.*, 375 F.2d 69 (2d Cir. 1967), and instead following this Court's holding in *Conley v. Gibson*, 335 U.S. 41, 48 (1957), that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits" and the Fifth Circuit's holding in *Swofford v. B&W, Inc.*, 336 F.2d 406, 408-09 (5th Cir. 1964) that, under Rule 39(b), untimely jury demands should be granted in the absence of "strong and compelling reasons to the contrary").

B. The Court Should Grant Certiorari to Summarily Reverse the Ninth Circuit's Denial of a Writ of Mandamus, Because Mandamus Should be Granted Whenever a Jury Demand Has Been Improperly Denied.

Even if the Court does not wish to grant full review to resolve the divisions in the courts of appeals identified above, the Court should still grant certiorari for a different purpose: to summarily reverse the Ninth Circuit's patently erroneous decision. This is because, while mandamus relief is discretionary in most other instances, a federal court of appeals is duty-bound to grant mandamus to protect the right to a jury trial "where it has been improperly denied."[41]

The Ninth Circuit was faced with just such an instance. Even if the circuit's rigid doctrine governing Rule 39(b) were accepted, Petitioner's untimely demand was supplemental. Petitioner had made a previous, timely demand. (App. 8-17 at 14). The District Court's decision to strike that demand was clearly erroneous, for two reasons.

First, the District Court committed clear error when it held that Petitioner's original jury demand was not filed on time. The District Court mistakenly held that a timely jury demand had to be both served *and filed* within 10 days of the defendant's answer. (App. 5-6). This is clearly erroneous. While Rule 38(b) requires

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[41] *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959); *see also Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472 (1962).

service of a jury demand within 10 days of the last pleading, it explicitly allows filing "in accordance with Rule 5(d)."[42] Rule 5(d) states that papers "must be filed within a reasonable time after service."[43] The only treatise to directly address this issue agrees that Rules 38(b) and 5(d), read together, plainly state that a timely jury demand must only be served within the deadline, and may then be filed "within a reasonable time after service."[44]

Courts routinely hold that filing a few days after service is presumptively "reasonable" under Rule 5(d), and have held a filing reasonable for up to 25 days after service.[45] Thus, there can be no question that

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[42] FED. R. CIV. P. 38(b) ("On any issue triable of right by a jury, a party may demand a jury trial by: (1) serving the other parties . . . no later than 10 days after the last pleading . . . and (2) filing the demand in accordance with Rule 5(d)[.]").

[43] FED. R. CIV. P. 5(d) (emphasis added).

[44] 50A C.J.S. *Juries* § 159 (June 2009) (citations omitted). This can be seen in connection with other rules that have a "within 10-days" service requirement. *Nichols v. Bd. of Tr. of the Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 887 (D.C. Cir. 1987) (filing five days after service met Rule 5(d)'s reasonableness requirement); *Claybrook Drilling Co. v. Divanco, Inc.*, 336 F.2d 697, 700 (10th Cir. 1964) (filing four days after service met Rule 5(d)'s reasonableness requirement).

[45] *E.g.*, *Sadowski v. Bombardier Ltd.*, 527 F.2d 1132, 1135 (7th Cir. 1975) (10 days held reasonable, noting uniform rule proposed by a committee of local judges suggested 5 days presumptively reasonable); *Black v. Alternative Painting Squared, Inc.*, No. 5:08-cv-88-oc-10GRJ, 2008 WL 2370394, at *1 n.10 (M.D. Fla. June 6, 2008) (7 days held reasonable); *Ives v. Guilford Mills, Inc.*, 3 F. Supp. 2d 191, 194-95 (N.D.N.Y. 1998) (16 days held reasonable);

Petitioner's original jury demand, which was filed only 5 days after it was served, was filed within a reasonable time under Rule 5(d), and therefore "in accordance with Rule 5(d)" under Rule 38(b). (App. 18-30). The District Court's misapplication of these provisions has deprived Petitioner of his right to a jury trial.

Second, the District Court committed clear error when it held that a jury demand contained in a proposed Case Management Plan was not a written demand within the meaning of Rule 38(b).[46] (App. 5). Precisely because the right to a jury trial is so fundamental, other courts which have addressed this issue have unanimously adopted a liberal approach to determine what qualifies as a "written demand" under Rule 38(b). In fact, a *draft* case management plan has been specifically held to satisfy Rule 38(b), so long as it gave notice of the intent to seek a jury trial.[47]

The District Court's pronouncement – that a document that is not usually served cannot contain a

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Curtis v. Das, No. 88 C 7249, 1990 WL 6831, at *2 (N.D. Ill. Jan. 9, 1990) (25 days held reasonable).

[46] FED. R. CIV. P. 38(b) (a party may make a jury demand by serving and filing "a written demand – which may be included in a pleading") (emphasis added).

[47] *Palmer v. Angelica Healthcare Servs. Group, Inc.*, 170 F.R.D. 88, 90 (N.D.N.Y. 1997) (the timely-served jury demand was in the party's draft case management plan, the final of which was not served until more than a month later); *accord Williams v. Agilent Techs.*, No. 04-1810 MMC, 2004 WL 2848005, at *1 (N.D. Cal. Dec. 10, 2004) (notice of intent to seek jury trial in case management plan satisfies Rule 38).

valid jury demand – is contrary to every other decision to address the issue, not to mention inapt, because proposed case management plans *are* usually filed.[48] The clear intent of Rule 38(b) is to provide notice to the other parties that a jury trial is being sought; thus, for instance, a civil cover sheet that indicates the desire for a jury trial satisfies this notice requirement if it is served, but not if it is merely filed with the court.[49]

There can likewise be no question that "service" can be accomplished through e-mail.[50] The District Court's

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[48] *E.g.*, *Favors v. Coughlin*, 877 F.2d 219, 220 (2d Cir. 1989) (civil cover sheet indicating desire for a jury trial is sufficient notice to constitute a Rule 38(b) jury demand); *Winant v. Carefree Pools*, 118 F.R.D. 28, 29 (E.D.N.Y. 1988) (same); *Palmer*, 170 F.R.D. at 90; *Williams*, No. 04-1810 MMC, 2004 WL 2848005, at *1.

[49] *Compare Wall v. Nat'l R.R. Passenger Corp.*, 718 F.2d 906, 909 (9th Cir. 1983) (civil cover sheet that is not served cannot satisfy Rule 38(b) because it does not provide notice), and *Gilmore v. Cal.*, Civ. No. 93-20788 #SW, 1995 WL 232364, at *5 (N.D. Cal. Apr. 17, 1995) ("Checking the jury demand box on the civil cover sheet does not meet the requirements of Rule 38(b) unless the cover sheet is served on the opposing party within the 10-day period."), *with Favors*, 877 F.2d at 220 (cover sheet which was served gave adequate notice), and *Winant*, 118 F.R.D. at 29 (same).

[50] FED. R. CIV. P. 5(b)(2)(E) (service may be "by electronic means if the person consented in writing – in which event service is complete upon transmission"). In the proceeding below, the defendant United States consented in writing to electronic service by applying to be an ECF-filer and filling out the District Court's ECF consent form (App. 40-45), in which the applicant agrees "to receive electronic service of documents, by email to the address(es) shown above." (App. 41). The proposed Case Management Plan was electronically served to the email address provided by defendant's counsel to the ECF system. (App. 8, 44). Electronic service, in practical terms, means service by e-mail – in fact, it is

holdings, which elevate form over substance, are contrary to all precedent.

In light of the District Court's clearly erroneous holdings, the Ninth Circuit was not free to summarily deny mandamus relief. This Court has emphasized "the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury."[51] The right to a jury trial is so fundamental that, "[w]hatever differences of opinion there may be in other types of cases . . . the right to grant mandamus to require jury trial where it has been improperly denied is settled."[52] In light of this Court's holdings, the Ninth Circuit's orders summarily denying mandamus, and summarily denying reconsideration, amount to clear error. They have deprived Petitioner of the jury trial to which he is entitled.[53]

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because of e-mail that the ECF system satisfies the service requirement, and not the other way around. *Kunamneni v. Gutierrez*, No. C 08-5154 PJH, 2009 U.S. Dist. LEXIS 32418, at *5 (N.D. Cal. Apr. 2, 2009) (holding that ECF effects "service" within the meaning of the Rule because "an automatic e-mail message will be generated by the ECF system and sent to all parties whose e-mail addresses have been registered in the case, which shall constitute service on the attorney or other persons[.]").

[51] *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472 (1962).

[52] *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959).

[53] U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved[.]").

CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that the Court grant certiorari on the questions presented.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: JOHN K. BALDWIN.	No. 10-70257
JOHN K. BALDWIN, Petitioner, v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE NORTHERN MARIANA ISLANDS, Respondent, UNITED STATES OF AMERICA, Real Party in Interest.	D.C. No. 1:09-cv-00033-ARM District of the Northern Mariana Islands ORDER (Filed Apr. 13, 2010)

Before: B. FLETCHER, FISHER and M. SMITH, Circuit Judges.

Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. United States Dist. Court,* 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

JOHN K. BALDWIN, Plaintiff v. UNITED STATES OF AMERICA, Defendant	Civil Action No. 09-0033 ORDER GRANTING DEFENDANT'S MOTION TO STRIKE JURY DEMAND (Filed Jan. 22, 2010)

THIS MATTER came before the court on Thursday, January 14, 2010, for hearing of defendant's motion to strike plaintiff's jury demand as untimely. Plaintiff appeared by and through his attorneys, Deborah Deitsch-Perez (by telephone) and David Banes; defendant appeared by and through Assistant U.S. Attorney Jeremy N. Hendon (by telephone).

THE COURT, having considered the written and oral arguments of counsel, rules as follows.

The precise issue before the court is whether a draft case management statement exchanged by e-mail between the parties constitutes a "written demand" and "filing" as required by Federal Rule of Civil Procedure 38(b). The court finds that such an exchange does not meet the requirements of Rule 38(b) and grants defendant's motion to strike plaintiff's jury demand as untimely.

The facts are not in dispute. Defendant concedes that plaintiff would be entitled to a jury *if* he had made a timely demand. Plaintiff's complaint, filed August 27, 2009, did not include a demand for a jury trial. Defendant answered on October 23, 2009. The parties met and conferred by telephone on November 4, 2009, pursuant to Fed.R.Civ.P. 26(f). The issue of a jury trial did not arise during the conference. The next day, defendant e-mailed to counsel for plaintiff a draft proposed joint case management plan. The plan stated that the case would be tried to the court. The next day plaintiff's counsel responded that she was still working on plaintiff's draft proposed case management plan and would e-mail it to defendant the following Monday. This was done, but plaintiff's plan stated that the case would be tried to a jury. Later that same day counsel conferred by telephone to resolve that particular discrepancy. Because they could not agree on a joint plan, each party submitted its own proposed case plan to the court on November 11, 2009.

Plaintiff argues that the e-mail exchange put defendant on notice that plaintiff wanted a jury trial, and that this satisfied both the "service" and "filing" requirements of Rule 38(b). Alternatively, plaintiff argues that the actual, written jury demand was served and filed only two days late and that the court should exercise the discretion seemingly afforded it under Fed.R.Civ.P. 39(b) to order a jury trial.

Defendant replies that an informal exchange of draft case management plans does not qualify as

"service" and that the jury demand, when finally filed with the court as required by Fed.R.Civ.P. 5(d), was two days late. As to the court exercising its discretion under Rule 39(b) to order a jury trial on plaintiff's late motion, defendant argues that the discretion afforded the court by case law is extremely narrow and does not encompass inadvertence or excusable neglect, the only two ways to characterize plaintiff's behavior.

Federal Rule of Civil Procedure 38(b) provides in relevant part:

> *Demand.* On any issue triable of right by a jury, a party may demand a jury trial by:
>
> (1) serving the other parties with a written demand – which may be included in a pleading – no later than 10 days after the last pleading directed to the issue is served; and
>
> (2) filing the demand in accordance with Rule 5(d).

Federal Rule of Civil Procedure 38(b) provides in relevant part:

> When No Demand Is Made. Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.

The plain language of Rule 38(b) supports defendant's argument that plaintiff's late jury demand

should be stricken. Subsection (b) requires that the demand be *served* and that it be *filed* within 10 days of, here, the filing of defendant's answer. To elevate an informal e-mail exchange of draft case management plans to the status of "service" does not comport with the technical sense with which that word is used in the Rule. The working drafts exchanged by counsel by e-mail before the separate proposed case management plans were actually filed do not qualify as documents which could be "filed" with the court. Finally, it is undisputed that plaintiff's actual filing was not accomplished until after the 10 day limit had elapsed.

Plaintiff's alternate argument – that the court should exercise its discretion to order a jury trial under Rule 39(b) – does not find support in Ninth Circuit precedent. The leading Rule 39(b) case, and one referred to by both parties, is *Pacific Fisheries Corp. v. Hih Cas. & Gen. Ins.*, 239 F.3d 1000 (9th Cir. 2001). There, the court held that the discretion afforded the trial court under 39(b) to order a jury trial even when one has not been timely requested is "narrow . . . and does not permit a court to grant relief when the failure to make a timely demand results from an oversight or inadvertence." *Id.* at 1002, *quoting Lewis v. Time Inc.*, 710 F.2d 549, 556-57 (9th Cir. 1983).

Here, counsel for plaintiff avers that the jury demand had appeared in earlier drafts of the complaint but had somehow been excised without her realizing it until she received and reviewed defendant's draft

proposed joint case management statement, which stated that the case was to be tried to the court. When plaintiff's draft case management statement was e-mailed to defendant, it included the demand for a jury trial, but merely putting plaintiff on notice that there was a difference of opinion does not count as "service." In any event, plaintiff's proposed case management plan was not *filed* until after the 10 day limit had run. Plaintiff's failure to include a jury trial demand is accurately characterized as "oversight or inadvertence." Accordingly, under existing Ninth Circuit precedent, this court may not exercise its discretion to order a jury trial despite the failure to timely demand one.

Finally, it is to the benefit of the parties and the court's administration of its docket when the federal rules are fully observed.

For the foregoing reasons, defendant's motion to strike plaintiff's jury demand is granted.

DATED this 22nd day of January, 2010.

/s/ Alex R. Munson
ALEX R. MUNSON
Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: JOHN K. BALDWIN.	No. 10-70257
JOHN K. BALDWIN, Petitioner, v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE NORTHERN MARIANA ISLANDS, Respondent, UNITED STATES OF AMERICA, Real Party in Interest.	D.C. No. 1:09-cv-00033-ARM District of the Northern Mariana Islands ORDER (Filed Jul. 08, 2010)

Before: B. FLETCHER, FISHER and M. SMITH, Circuit Judges.

The petition for panel rehearing is construed as a motion for reconsideration. So construed, the motion is denied. *See* 9th Cir. R. 27-10. The motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. Gen. Ord. 6.11.

No further filings shall be accepted in this closed case.

From: Deborah Deitsch-Perez
To: "Hendon, Jeremy (TAX)"; Nardiello, Chad D. (TAX)
Cc: "Edward M. Robbins"; David Banes
Subject: RE: Baldwin v. United States (USDC D. NMI) – Proposed Case Management Plan
Date: Monday, November 09, 2009 1:07:00 PM
Attachments: proposed case mgmt plan2.wpd

Did you send me your Rule 26 disclosure? Didn't receive. When would be good to talk about the proposed case management plan as our proposed plan has considerable changes. I have done this in track changes. You may have to click on "reviewer" to see that (?). Anyway, on my copy, my changes show up in red.

From: Hendon, Jeremy (TAX) [mailto:Jeremy.Hendon@usdoj.gov]
Sent: Thursday, November 05, 2009 10:40 AM
To: Deborah Deitsch-Perez
Cc: Nardiello, Chad D. (TAX)
Subject: Baldwin v. United States (USDC D. NMI) – Proposed Case Management Plan

Deborah:

As discussed, attached please find a draft (Proposed) Case Management Plan. Please review the draft at your earliest convenience and let us know if you have

any questions as soon as possible. If it is acceptable to you, please sign, date, and fax/email it back to us and we can get it efiled by Tuesday's deadline.

In addition, you had requested if we could email a copy to Ed Robbins to review as well. Because Ed is not a counsel of record in this case, we cannot email him a copy of this draft plan. If you would like for him to review it, you will have to forward it to him.

Regards,
Jeremy

LEONARDO M. RAPADAS
United States Attorney

JEREMY N. HENDON
CHAD D. NARDIELLO
Trial Attorneys, Tax Division
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MIKEL W. SCHWAB
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Hagatna, GU 96910
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Facsimile: (671) 472-7215/7334

Attorneys for Defendant United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

JOHN K. BALDWIN, Plaintiff, v.	)	Case No. CV 09-0033 **(PROPOSED) CASE MANAGEMENT PLAN** (Filed: Nov. 14, 2009)

UNITED STATES OF AMERICA,
Defendant.

Pursuant to Federal Rules of Civil Procedure 16 and Local Rule 16.2CJ1(c), the parties hereby submit the following Case Management and Discovery Plan:

A. ***Nature of the Case*:** Plaintiff, John K. Baldwin, seeks a refund of tax, penalties, and interest he paid to the Internal Revenue Service ("IRS") regarding his 2002 tax year that he alleges the IRS improperly assessed against him.

B. ***Service of process on parties not yet served*:** All parties have been served.

C. The parties agree that jurisdiction and venue are proper.

D~~C~~. ***Track Assignment*:** The case is assigned to the Complex Track.

E~~D~~. ***Anticipated Motions*:**

1. The anticipated discovery motions are: **None are anticipated at this time.** All discovery motions shall be filed on or before July**~~December~~ 20, 2010.**

2. The anticipated dispositive motions are: **Unknown at this time.** All dispositive motions shall be filed on or before **November~~March~~ 1, 2010~~1~~.**

3. Last day to file Motion(s) to Amend: **December ~~January~~ 4, 2009~~10~~.**

4. Last day to file Motion to Add Parties: **-December~~January~~ 4, 2009~~10~~.**

~~F~~E. ***Joinder of Parties*:** Last day to join parties is: **December~~January~~ 4, 2009~~10~~.**

~~G~~F. ***Necessity of Special Procedures*:** One of the issues raised by Plaintiff in his refund suit is a request for a refund of $200,000 that represents expenses claimed for legal and advisory fees stemming from the transaction at issue in a pending case in this Court, *Claston v. United States*, Civil No. 08-CV-0048. Resolution of the issue involving expenses for legal and advisory fees may ~~will~~ depend ~~in large part~~ on the resolution of the *Claston* case. Therefore, given the overlap between the cases, in order to conserve judicial and the parties' resources and maximize the potential for global settlement, the cases should be consolidated for trial. Based on the propsed schedule set forth herein, consolidation would delay the earlier filed case by only a month. ~~that issue should be bifurcated and stayed pending a resolution of the Claston case. However, the remaining issues raised by Plaintiff in this case can proceed~~.

~~H~~G. ***Discovery Plan*:** The following is the description and schedule of all pretrial discovery each party intends to initiate prior to the close of discovery:

1. ***Initial Disclosures*:** The parties served their initial disclosures on November 6, 2009, and

will informally exchange documents by November 25, 2009.

2. ***Depositions*:** Depositions are still to be scheduled. ~~The parties stipulate and agree that each party can take more than allotted ten (10) depositions provided for in Fed. R. Civ. P. 30(a)(2).~~

3. *Written Discovery*: Each party may propound interrogatories, requests to produce and requests for admissions within the limits set by the Federal Rules of Civil Procedure. If either party determines that it needs to propound more discovery than permitted by the Rules, the parties will confer in good faith to accommodate reasonable discovery requests prior to the filing of any motion relating to a discovery dispute.

4. ***Discovery Cutoff*:** The discovery cutoff date (defined as the last date to file responses to discovery) shall be **July ~~December~~ 20, 2010**.

5. ***Expert Discovery*:**

a. The disclosures of Plaintiff's expert testimony required under Federal Rule of Civil Procedure 26(a)(2) shall be made by **June ~~anuary~~ 21, 2010~~1~~**.

b. The disclosures of Defendant's expert testimony required under Federal Rule of Civil Procedure 26(a)(2) shall be made by **July~~February~~ 21, 2010~~1~~**.

c. Any designation of rebuttal expert testimony under Rule 26(a)(2) shall be made no later than **August~~March~~ 23, 2010~~1~~**.

d. The depositions of experts shall be completed no later than **September 30, 2010 ~~April 22, 2011~~.**

~~I~~H. ***Settlement*:** The prospects for settlement are being explored.

~~J~~I. ***Settlement Conference*:** After adequate discovery has occurred, the parties may wish to submit this case to a settlement conference.

K~~J~~. ***Preliminary Pretrial Conference*:** The preliminary pretrial conference shall be held on ___ **January 7, 2011 at 9am**~~_____~~.

L~~K~~. ***Pretrial Filings*:** The parties' pretrial materials, discovery materials, witness lists, exhibit lists, and designation of discovery responses shall be filed on or before **December 21, 2010~~June21, 2011~~**.

M~~L~~. ***Pretrial Order*:** The proposed pretrial order shall be filed on or before **January 20, 2011~~une 28, 2011~~**.

N~~M~~. ***Final Pretrial Conference*:** The final pretrial conference shall be held on February 11, 2011 ~~_____~~at 9am~~___.m~~.

O~~N~~. ***Trial*:** Trial shall commence at **February 21, 2011 at** _____. ~~**July 11, 2011** at _____.m~~.

P~~O~~. ***Jury*:—This is a jury case.** ~~This is a trial before the Court; no jury~~.

~~PQ~~. *Anticipated Trial Time*: It is anticipated that it will take approximately 21~~5-7~~ days to try this case as consolidated with the Claston case, or 5-7 days on its own..

R~~Q~~. *Identity of Counsel*:

Deborah Deitsch-Perez
Lackey Hershman, LLP
3102 Oak Lawn Ave., Suite 777
Dallas, Texas 75219

Gregory G. Koebel
O'Connor Berman Dotts & Banes
P.O. Box 501969
Saipan , MP 96950
Attorneys for Plaintiff

Jeremy N. Hendon
Chad D. Nardiello
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 683, Ben Franklin Station
Washington, D.C. 20044-0683
Attorneys for Defendant United States of America

~~WHEREFORE, the parties respectfully request this Court adopt this Case Management Plan.~~

~~SO ORDERED:~~ _____.

_____

~~HON. ALEX R. MUNSON~~
~~**District Court Judge**~~

SO STIPULATED: this ___ day of November, 2009.

LACKEY HERSHMAN, LLP

_____

DEBORAH DEITSCH-PEREZ
Lackey Hershman, LLP
3102 Oak Lawn Ave., Suite 777
Dallas, Texas 75219

-and-

O'Connor Berman Dotts & Banes

_____

GREGORY KOEBEL
~~Gregory G. Koebel~~
DAVID BANES
O'Connor Berman Dotts & Banes
P.O. Box 501969
Saipan , MP 96950

SO STIPULATED: this ___ day of November, 2009.

LEONARDO M. RAPADAS
United States Attorney
Districts of Guam and the NMI

By: _____

JEREMY N. HENDON
CHAD D. NARDIELLO
Trial Attorneys, Tax Division
U.S. Department of Justice
Post Office Box 683
Ben Franklin Station
Washington, D.C. 20044

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing **(PROPOSED) CASE MANAGEMENT PLAN** has been made this 11th day of November, 2009, electronically through CM/ECF to:

Deborah Deitsch-Perez ddp@lhlaw.net

Gregory G. Koebel attorneys@saipan.com

/s/ Jeremy N. Hendon
JEREMY N. HENDON
Trial Attorney, Tax Division
U.S. Department of Justice

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3102 Oak Lawn Avenue, Suite 777
Dallas, TX 75219-4241
Telephone No. (214) 560-2201
Facsimile No. (214) 560-2203

Attorneys for Plaintiff John K. Baldwin

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

JOHN K. BALDWIN	)	**CIVIL CASE NO. 09-0033**
Plaintiff,	)	
vs.	)	**CERTIFICATE OF SERVICE**
UNITED STATES OF AMERICA,	)	(Filed: Nov. 14, 2009)
Defendant.	)	

I certify that the annexed Draft Proposed Case Management Order containing a Notice of Jury Demand was served on the United States by email (copy attached as Exhibit 1) on Monday, October 9, 2009.

RESPECTFULLY SUBMITTED this 13th day of November, 2009.

LACKEY HERSHMAN, LLP

By: */s/Deborah Deitsch-Perez*
DEBORAH DEITSCH-PEREZ
Lackey Hershman, LLP
3102 Oak Lawn Avenue, Suite 777
Dallas, TX 75219-4241
Telephone No. (214) 560-2201
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– and –

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Telephone No. (670) 234-5684
Facsimile No. (670) 234-5683

Attorneys for Plaintiff John K. Baldwin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing CERTIFICATE OF SERVICE of draft proposed Case Management Plan has been made this 13th day

of November, 2009, via email and electronically through CM/ECF to:

Jeremy N. Hendon	Jeremy.Hendon@usdoj.gov
Chad D. Nardiello	Chad.D.Nardiello@usdoj.gov
Leonardo M. Rapadas	Leonardo.M.Rapadas@usdoj.gov
Mikel W. Schwab	Mikel.Schwab@usdoj.gov
Jessica F. Cruz	Jessica.F.Cruz@usdoj.gov

/s/ Deborah Deitsch-Perez
DEBORAH DEITSCH-PEREZ
Lackey Hershman, LLP

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Jeremy

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United States Attorney

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MIKEL W. SCHWAB
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Assistant United States Attorneys
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108 Hernan Cortez Avenue
Hagatna, GU 96910
Telephone: (671) 472-7332
Facsimile: (671) 472-7215/7334

Attorneys for Defendant United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

JOHN K. BALDWIN,	)	Case No. CV 09-0033
Plaintiff,	)	**(PROPOSED) CASE MANAGEMENT PLAN**
v.	)	

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Defendant.

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d. The depositions of experts shall be completed no later than **September 30, 2010 ~~April 22, 2011~~.**

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M~~L~~. ***Pretrial Order*:** The proposed pretrial order shall be filed on or before **January 20, 2011~~une 28, 2011~~**.

N~~M~~. ***Final Pretrial Conference*:** The final pretrial conference shall be held on February 11, 2011 ~~_____~~at 9am~~___.m~~.

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P~~O~~. ***Jury*:—This is a jury case.** ~~This is a trial before the Court; no jury~~.

~~PQ~~. ***Anticipated Trial Time***: It is anticipated that it will take approximately 21~~5-7~~ days to try this case as consolidated with the Claston case, or 5-7 days on its own..

R~~Q~~. ***Identity of Counsel***:

Deborah Deitsch-Perez
Lackey Hershman, LLP
3102 Oak Lawn Ave., Suite 777
Dallas, Texas 75219

Gregory G. Koebel
O'Connor Berman Dotts & Banes
P.O. Box 501969
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Attorneys for Plaintiff

Jeremy N. Hendon
Chad D. Nardiello
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 683, Ben Franklin Station
Washington, D.C. 20044-0683
Attorneys for Defendant United States of America

~~WHEREFORE, the parties respectfully request this Court adopt this Case Management Plan.~~

~~SO ORDERED:~~ _____.

_____

~~HON. ALEX R. MUNSON~~
~~District Court Judge~~

SO STIPULATED: this ___ day of November, 2009.

LACKEY HERSHMAN, LLP

_____

DEBORAH DEITSCH-PEREZ
Lackey Hershman, LLP
3102 Oak Lawn Ave., Suite 777
Dallas, Texas 75219

-and-

O'Connor Berman Dotts & Banes

_____

GREGORY KOEBEL
~~Gregory G. Koebel~~
DAVID BANES
O'Connor Berman Dotts & Banes
P.O. Box 501969
Saipan , MP 96950

SO STIPULATED: this ___ day of November, 2009.

LEONARDO M. RAPADAS
United States Attorney
Districts of Guam and the NMI

By: _____

JEREMY N. HENDON
CHAD D. NARDIELLO
Trial Attorneys, Tax Division
U.S. Department of Justice
Post Office Box 683
Ben Franklin Station
Washington, D.C. 20044

_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing **(PROPOSED) CASE MANAGEMENT PLAN** has been made this 11th day of November, 2009, electronically through CM/ECF to:

Deborah Deitsch-Perez	ddp@lhlaw.net
Gregory G. Koebel	attorneys@saipan.com

/s/ Jeremy N. Hendon
JEREMY N. HENDON
Trial Attorney, Tax Division
U.S. Department of Justice

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Telephone No. (214) 560-2201
Facsimile No. (214) 560-2203

Attorneys for Plaintiff
John K. Baldwin

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

JOHN K. BALDWIN **Plaintiff,** **vs.** **UNITED STATES OF AMERICA,** **Defendant.**	**CIVIL CASE NO. 09-0033** **DEMAND FOR JURY TRIAL** (Filed: Nov. 11, 2009)

Plaintiff hereby demands a jury trial with respect to all issues so triable.

Date:
November 1, 2009

O'CONNOR BERMAN
DOTTS & BANES

By: /s/
GREGORY J. KOEBEL, ESQ.
Attorney for Plaintiff

GREGORY J. KOEBEL, ESQ.
DAVID BANES, ESQ.
O'Connor Berman Dotts & Banes
Second Floor, Marianas Business Plaza
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Telephone No. (214) 560-2201
Facsimile No. (214) 560-2203

Attorneys for Plaintiff
John K. Baldwin

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

JOHN K. BALDWIN **Plaintiff,** **vs.** **UNITED STATES OF AMERICA,** **Defendant.**	**CIVIL CASE NO. 09-0033** **DECLARATION OF DEBORAH DEITSCH-PEREZ** **Date: January 14, 2010** **Time: 9 a.m.** **Judge: Alex R. Munson** (Filed: Dec. 23, 2009)

STATE OF TEXAS :
:
COUNTY OF DALLAS :

I, Deborah Deitsch-Perez, pursuant to 28 USC § 1746, hereby declare as follows:

1. I am a member of Lackey Hershman, LLP, co-counsel for Plaintiff John K. Baldwin. I make this affidavit in opposition to the motion of the United States to strike Plaintiff's jury demand and in support of Plaintiff's request to allow Plaintiff's supplemental jury demand.

2. Defendant admits to receiving timely written notice that Plaintiff sought a jury trial in Plaintiff's draft Proposed Case Management Conference Statement, that I emailed to counsel for Defendant on November 9, 2009.[1] Hendon Dec. ¶ 8; United States Points and Authorities in Support of Motion to Strike Plaintiff's Jury Trial Demand at 2:8-12. Defendant admits that it received this jury demand within the ten days required by Rule 38(b), when, as allowed, weekends and holidays are excluded pursuant to Rule 6(a) and three days are added pursuant to Rule 6(d). *Id.* Nonetheless Defendant seeks to strike Plaintiff's jury demand.

3. The initial draft of the complaint in this case was a shell started from the complaint in the related *Claston v. United States* case, 08-cv-0048, Docket No. 1. That pleading had a jury demand at paragraph 16. At some point, while being edited in

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[1] A copy of the email and emailed draft Proposed Case Management Statement containing the jury demand as item "P" is annexed hereto as Ex. 1.

order to effectuate the comments of the several people reviewing the complaint, the jury demand was incorrectly deleted, and neither I, nor, to my knowledge, any of the other reviewers noticed. The civil cover sheet was not circulated to me, so I was not alerted to the fact that the original jury demand had been deleted. I understand that the sheet had been filled out by a paralegal in the O'Conner office who was not aware that Plaintiff sought a jury trial.

4. The United States served a draft Case Management Conference Order on Plaintiff on November 5, 2009. It stated "this is a trial before the Court; no jury."[2] It did not state that Plaintiff had not made a timely jury demand. Believing a jury demand had already been made in the Complaint, and thinking the United States was making a substantive argument that no jury was allowed because this case was related to a pending case involving a "TEFRA" (non-jury) claim, I responded ***within the ten days in which a jury demand could still be made,*** by serving on counsel for Defendant a draft Case Management Conference Statement containing a jury demand reciting that the case was to be tried to a jury.[3]

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[2] A copy of the draft case management conference order served by the United States on November 5, 2009 is annexed hereto as Ex. 2.

[3] *See* Ex. 1.

5. The next day, after the ten days expired, the United States served its final Proposed Case Management Statement, asserting for the first time that Plaintiff had not made a timely jury demand.[4]

6. As a result, Plaintiff immediately served and filed a freestanding document entitled "Jury Demand"[5] and thereafter filed a copy of its earlier timely-served jury demand contained within Plaintiff's draft Case Management Conference Statement, along with a certificate of service.[6]

7. Plaintiff's jury demand was contained within its proposed Case Management Conference Statement, which unequivocally rejected Defendant's contention that this was a non-jury case.[7] The proposed Case Management Conference Statement was

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[4] *Baldwin v. United States*, 09-cv-0033, Docket No. 15. In the parties' informal telephone conference on November 9, 2009, the United States did not assert that no timely jury demand had been made or challenge the demand contained in the draft Proposed Case Management Conference Settlement, presumably knowing that I would then immediately file and serve a formal jury demand. Instead, the United States continued to leave the impression that it contended Plaintiff lacked a substantive right to a jury trial. In the November 9, 2009 telephone conference, the parties disagreed on the possibility of consolidation with the *Claston* case, and the proposed length of the discovery schedule. These issues precluded the parties from filing a Joint Case Management Statement.

[5] *Baldwin v. United States*, 09-cv-0033, Docket No. 16.

[6] *Baldwin v. United States*, 09-cv-0033, Docket No. 18, annexed hereto as Ex. 3.

[7] *See* Exs. 1 and 3 hereto.

served electronically on November 9, 2009, within the requisite ten-day period.[8]

8. Plaintiff John Baldwin chose to pay the United States $5,080.000.49 that he disputed in order to have a jury trial in this court, rather than a bench trial in tax court. See email confirmation of payment, annexed hereto as Ex. 4 and the accompanying declaration of John K. Baldwin ¶ 2.

9. The issues to be tried in this case are factual and simple. They include: were certain debts reasonably determined to be uncollectable in 2002; was certain stock worthless in 2002; did Plaintiff actually expend certain fees taken as expense deductions? These are issues well suited for trial by jury.

10. Finally, Defendant received notice of Plaintiff's desire to have a jury trial well before engaging in discovery, motion practice, expert selection or any other significant activities in the case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23nd day of December, 2009, in Dallas County, Texas.

/s/ Deborah Deitsch-Perez
Deborah Deitsch-Perez

---

[8] *Id.*

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Attorneys for Plaintiff
John K. Baldwin

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

JOHN K. BALDWIN **Plaintiff,** **vs.** **UNITED STATES OF AMERICA,** **Defendant.**	**CIVIL CASE NO. 09-0033** **DECLARATION OF JOHN K. BALDWIN** **Date: January 14, 2010** **Time: 9 a.m.** **Judge: Alex R. Munson**

(Filed: Dec. 23, 2009)

STATE OF HAWAII :
:
COUNTY OF HONOLULU :

I, John K. Baldwin, pursuant to 28 USC § 1746, hereby declare as follows:

1. I am the Plaintiff in the above-captioned case. I make this declaration in opposition to Defendant's motion to strike my jury demand and in support of my request to allow me to have my case tried to a jury.

2. I paid taxes, interest and penalties that I do not believe I owe of over $5 million in order to have the right to a jury trial in this Court. I understand that I could have pursued my case in tax court, without a jury, without paying any of the disputed amount unless I lost the case. I felt so strongly, I paid the $5 million even though the interest I understand I will receive if I win will not likely cover the losses I will suffer by not having the use of the $5 million during this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Honolulu, Hawaii on December 22, 2009.

/s/ John K. Baldwin
John K. Baldwin

User Agreement for Electronic Case Filing at the United States District Court for the Northern Mariana Islands

This registration agreement is required of every "Filing User" who will file case documents online, using the "Case Management / Electronic Case Filing" (CM/ECF) system operated by the United States District Court for the Northern Mariana Islands. Upon registration and acceptance of the terms of use, qualified Filing Users will be issued a login username and password for purposes of online case filing.

Registrant Information

Your Name: _____

Firm or Office: _____

Mailing Address: _____

Office Telephone: _____ Fax: _____

Home Telephone: _____ Cellphone: _____

Are you a Bar Member in this District? _____

Are you temporarily admitted to practice in this District? _____

Other basis for requesting Filing User access: _____

Email Addresses (to receive electronic service of documents) Primary: _____

Additional: _____

- I understand that I will be personally responsible for the use of my CM/ECF log-in username and password, and that any documents filed in cases in this District using my log-in username and password are deemed to be electronically signed and filed by me. If security of my username or password are compromised, I understand that I must immediately contact the Clerk of Court to report the nature of the compromise.

- I have received a copy of the "*Administrative Procedures for Electronic Filing and Electronic Service for the United States District Court for the Northern Mariana Islands*", and will comply with these procedures in my use of the CM/ECF electronic filing system. I understand that binding changes to these procedures may be published to all Filing Users on future occasions when necessary.

- I agree to receive electronic service of documents, by email to the address(es) shown above. I understand that I am responsible for the operability of my email service. I will notify the Clerk of Court immediately if any of the email address(es) shown above are modified or discontinued.

- I understand that not all parties in cases are able to receive service by electronic means, and for any document filed in the CM/ECF electronic filing system if the resultant "Notice of Electronic Filing" does not verify that a party has been served electronically, I am

responsible to serve that party by traditional non-electronic means.

- I will not make inappropriate use of my Filing User status in the CM/ECF system, by accessing online case data in cases where I do not represent any party, except for data which is otherwise available to the general public, who are not "Filing Users".

Registrant's Signature _____ Date: _____

(For U.S. District Court Use Only)

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By: _____ Date: _____
U.S. District Court, Northern Mariana Islands

CM/ECF Username: _____ User Type: _____

User Account Installed By: _____ Date: _____

From: Deborah Deitsch-Perez
To: Deborah Deitsch-Perez
Subject: FW: Activity in Case 1:09-cv-00033 Baldwin v. USA Answer to Complaint
Date: Monday, January 25, 2010 10:22:56 AM

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From: ecf-nmid@nmid.uscourts.gov
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Sent: Friday, October 23, 2009 11:56 PM
Subject: Activity in Case 1:09-cv-00033 Baldwin v. USA Answer to Complaint

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U.S. District Court

Northern Mariana Islands

Notice of Electronic Filing

The following transaction was entered by Hendon, Jeremy on 10/23/2009 at 11:56 PM GMT+10 and filed on 10/23/2009

Case Name:	Baldwin v. USA
Case Number:	1:09-cv-33
Filer:	United States of America
Document Number:	5

Docket Text:
ANSWER to Complaint by United States of America. Related document: [1] Complaint filed by John K. Baldwin. (Hendon, Jeremy)

1:09-cv-33 Notice has been electronically mailed to:

Gregory G. Koebel attorneys@saipan.com

Jeremy N. Hendon jeremy.hendon@usdoj.gov, frances.leonguerrero@usdoj.gov, guam.docket@usdoj.gov, marie.chenery@usdoj.gov, mikel.schwab@usdoj.gov, western.hendon@usdoj.gov

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No. 10-469

In the Supreme Court of the United States

JOHN K. BALDWIN, PETITIONER

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE NORTHERN MARIANA ISLANDS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly declined to issue a writ of mandamus requiring the district court to order a jury trial, where petitioner inadvertently failed to make a timely jury demand.

2. Whether, in denying petitioner's request for mandamus relief, the court of appeals erred in declining to overturn the district court's conclusion that petitioner's "red-lined" draft of a case management statement, attached to an e-mail to government counsel, did not constitute a written demand for a jury trial that had been properly served on the government.

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In the Supreme Court of the United States

No. 10-469

JOHN K. BALDWIN, PETITIONER

v.

UNITED STATES DISTRICT COURT
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ISLANDS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals denying mandamus (Pet. App. 1) is unreported. The opinion of the district court (Pet. App. 2-6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 2010. A petition for rehearing, which the court construed as a motion for reconsideration, was denied on July 8, 2010 (Pet. App. 7). The petition for a writ of certiorari was filed on October 6, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On August 27, 2009, petitioner filed a federal income-tax refund suit in the United States District Court for the Northern Mariana Islands. Petitioner's complaint did not contain a jury demand. The government filed its answer on October 23, 2009. Pet. App. 43-44.[1]

As required by Federal Rule of Civil Procedure 26(f), the parties met and conferred by telephone on November 4, 2009. Pet. App. 3. The issue of a jury trial did not arise during the conference. *Ibid.* The following day, government counsel e-mailed a proposed joint case-management plan to petitioner's attorney. The government's proposed plan stated that the case would be tried to the court, without a jury. *Ibid.*

Four days later, on November 9, 2009, petitioner e-mailed to the government a revised version of the proposed joint plan. Pet. App. 3. In the document petitioner e-mailed to the government, the government's statement that the case would be tried to the court had been crossed out and replaced with the statement "This is a jury case." *Id.* at 14. Later in the day on November 9, the parties conferred by telephone to attempt to resolve the differences between their proposed plans. *Id.* at 3.

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[1] Petitioner is a sophisticated businessman who has set up layers of business entities and has engaged in tax-shelter transactions. 09-CV-00033 Docket Entry No. 28, at 6 n.3 (Dec. 31, 2009) (Dkt. No. 28). The government anticipates that the issues to be tried will include, *inter alia*, whether complicated, high-dollar deals (between potentially related entities) were in fact real and created actual debts that became worthless; whether stock that may not have been publicly traded also became worthless and, if so, in what year; and whether petitioner, rather than an affiliated person or entity, paid for various expenses and would be entitled to certain deductions in the year claimed. *Ibid.*

Because they were unable to reach an agreement, no joint plan was filed. *Ibid.*

Instead, on November 11, 2009, the parties filed separate proposed case-management plans. Pet. App. 3. In its plan, the government stated that petitioner had not timely made a jury demand. Dkt. No. 15, at 4 (Nov. 11, 2009). Petitioner, by contrast, asserted in his proposed plan that

> [petitioner] is entitled to a jury trial under 28 USC § 2402, which grants a right to jury trial, upon request, in any action against the United States under 28 USC § 1346(a)(1) to recover wrongfully assessed and/or collected taxes, interest and/or penalties. If the United States disputes that this request is timely, [petitioner] will move the Court to declare it so, or, in the alternative, move to dismiss without prejudice under Fed. R. Civ. P. Rule 41(a) and refile the Complaint.

Dkt. No. 17, at 3-4 (Nov. 11, 2009).

On the same day, petitioner filed a pleading entitled "Demand for Jury Trial" (Dkt. No. 16 (Nov. 11, 2009)), which stated that petitioner "hereby demands a jury trial with respect to all issues so triable." Three days later, petitioner filed a document styled a "certificate of service" stating that the "annexed Draft Proposed Case Management Order containing a Notice of Jury Demand was served on the United States by [e-mail] * * * on Monday, [November] 9, 2009." Pet. App. 18. Attached to petitioner's "certificate of service" was the e-mail he had sent the government on November 9, which contained the "red-lined" version of the government's proposed joint case management plan. *Id.* at 21-30.

Rule 38(b), as in effect prior to December 1, 2009, provided:

> On any issue triable of right by a jury, a party may demand a jury trial by: (1) serving the other parties with a written demand — which may be included in a pleading — no later than 10 days after the last pleading directed to the issue is served; and (2) filing the demand in accordance with Rule 5(d).

Rule 39(b) then, as now, provided: "Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded."

The government moved to strike petitioner's November 11 jury demand as untimely, on the ground that it had been served more than ten days (excluding Saturdays, Sundays and holidays, per Rule 6(a), plus three days for service, per Rule 6(d)) after the filing (on October 23, 2009) of the government's answer. Dkt. No. 22 (Dec. 19, 2009).[2] In response, petitioner contended that the red-line changes in the November 9 e-mail constituted a timely jury demand because the document containing those changes had been served on the government within ten days of the government's answer and had been filed with the court on November 14. Dkt. No. 24 (Dec. 23, 2009). Petitioner's counsel also submitted an affidavit (Pet. App. 33-37) stating that a jury demand had been included in a draft of the complaint, but that the demand had been "incorrectly deleted" from the complaint and was not included on the civil cover sheet. Petitioner also argued that if the district court consid-

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[2] The last day for serving a jury demand in this case was November 9, 2009.

ered the November 11 document entitled "Demand for Jury Trial" to be the jury demand, the court should excuse the late filing under Rule 39(b) or, alternatively, should find that the failure was "excusable neglect" under Rule 6(b). Dkt. No. 24, at 6-9.

The district court granted the government's motion to strike the jury demand. Pet. App. 2-6. The court found that the "draft case management statement exchanged by e-mail between the parties" did not "constitute[ ] a 'written demand' and 'filing' as required by Federal Rule of Civil Procedure 38(b)." *Id.* at 2. The court explained:

> To elevate an informal e-mail exchange of draft case management plans to the status of "service" does not comport with the technical sense with which that word is used in the Rule. The working drafts exchanged by counsel by e-mail before the separate proposed case management plans were actually filed do not qualify as documents which could be "filed" with the court. Finally, it is undisputed that [petitioner's] actual filing was not accomplished until after the 10 day limit had elapsed.

Id. at 5.

The district court declined to grant petitioner relief under Rule 39(b). Pet. App. 5-6. The court concluded, based on the decision of the court of appeals in *Pacific Fisheries Corp.* v. *H.I.H. Casualty & General Insurance, Ltd.*, 239 F.3d 1000 (9th Cir.), cert. denied, 534 U.S. 944 (2001), that its discretion to grant relief under Rule 39(b) should not be exercised if the failure to timely request a jury trial was due to "oversight or inadvertence." Pet. App. 5. Because the court determined that petitioner's failure to include the jury demand was

due to "oversight or inadvertence," it found that it could "not exercise its discretion to order a jury trial despite the failure to timely demand one." *Id.* at 5-6. The court also stated that it "is to the benefit of the parties and the court's administration of its docket when the federal rules are fully observed." *Id.* at 6.

Petitioner filed a petition in the court of appeals for a writ of mandamus, which the court denied in a summary order. Pet. App. 1. The court of appeals subsequently denied reconsideration and reconsideration en banc. *Id.* at 7.

ARGUMENT

Petitioner identifies no sound reason for concluding either that the court of appeals erred in denying mandamus relief, or that such relief would have been granted if a similar request had been made to another court of appeals. Further review is not warranted.

1. Petitioner's invocation (Pet. 9-10, 28) of the "hallowed" constitutional right to trial by jury is misplaced in the circumstances of this case, for there is no Seventh Amendment right to jury trial in a case brought against the United States. *McElrath* v. *United States*, 102 U.S. 426, 440 (1880). Petitioner's right to a jury trial is purely statutory, see 28 U.S.C. 1346(a)(1) and 2402, and has no constitutional dimension. Petitioner also contends (Pet. 16) that he paid $5 million in taxes to litigate his case before a jury in the district court, rather than choose a bench trial in the Tax Court. As this Court observed in *Dobson* v. *Commissioner*, 320 U.S. 489, 495 (1943), however, jury trials are frequently waived in tax refund cases brought in district court.

2. As the court of appeals correctly concluded, "[p]etitioner has not demonstrated that this case war-

rants * * * the extraordinary remedy of mandamus. *See Bauman* v. *United States Dist. Court*, 557 F.2d 650 (9th Cir. 1977)." Pet. App. 1. "[T]hree conditions must be satisfied" before an appellate court may issue a writ of mandamus. *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380 (2004). First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Id.* at 380-381 (citation and internal quotation marks omitted). Second, "the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable." *Id.* at 381 (brackets and internal quotation marks omitted). Third, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Ibid*; see *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947) (stating that the writ of mandamus is a "drastic and extraordinary remed[y]" that is "reserved for really extraordinary causes"). Petitioner cannot satisfy those requirements.

As a threshold matter, the question whether the district court properly granted the government's motion to strike petitioner's jury demand can be resolved on direct appeal, rendering the extraordinary remedy of mandamus unnecessary. In fact, all but one of the court of appeals decisions on which petitioner relies were issued on direct appeals *after* the cases had proceeded to judgment in the district courts. See *Andrews* v. *Columbia Gas Transmission Corp.*, 544 F.3d 618, 628, 632-633 (6th Cir. 2008) (affirming the district court's denial of the plaintiff's untimely request for a jury trial on direct appeal after a bench trial); *Pacific Fisheries Corp.* v. *HIH*

Cas. & Gen. Ins., Ltd., 239 F.3d 1000, 1002-1003 (9th Cir.) (same), cert. denied, 534 U.S. 944 (2001); *SEC* v. *Infinity Group Co.*, 212 F.3d 180, 186, 195-196 (3d Cir. 2000) (same), cert. denied, 532 U.S. 905 (2001); *BCCI Holdings (Luxembourg), S.A.* v. *Khalil*, 214 F.3d 168, 172-173 (D.C. Cir.) (same), cert. denied, 531 U.S. 958 (2000); *Farias* v. *Bexar County Bd. of Trs. for Mental Health Mental Retardation Servs.*, 925 F.2d 866, 873 (5th Cir.) (same), cert. denied, 502 U.S. 866 (1991); *Parrott* v. *Wilson*, 707 F.2d 1262, 1267-1268 (11th Cir.) (same), cert. denied, 464 U.S. 936 (1983); *Littlefield* v. *Fort Dodge Messenger*, 614 F.2d 581, 585 (8th Cir.) (same), cert. denied, 445 U.S. 945 (1980); *Malbon* v. *Pennsylvania Millers Mut. Ins. Co.*, 636 F.2d 936, 940-941 (4th Cir. 1980) (same); see also *Members* v. *Paige*, 140 F.3d 699, 703-704 (7th Cir. 1998) (reversing the district court's denial of the plaintiff's untimely request for a jury trial on direct appeal after the district court granted summary judgment in favor of the defendants); *Rowlett* v. *Anheuser-Busch, Inc.*, 832 F.2d 194, 199-200 (1st Cir. 1987) (affirming on direct appeal the district court's decision to grant the plaintiff's belated request for a jury trial); *Merritt* v. *Faulkner*, 697 F.2d 761, 766-767 (7th Cir.) (*Merritt*) (reversing the district court's denial of the plaintiff's untimely request for a jury trial on direct appeal after a bench trial), cert. denied, 464 U.S. 986 (1983); *United States* v. *191.07 Acres of Land*, 482 F.3d 1132, 1135-1136 (9th Cir. 2007) (holding that a party may raise the question of his right to a jury trial on direct appeal even if the party stipulated to a bench trial after his request for a jury trial was denied).[3]

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[3] *Nissan Motor Corp.* v. *Burciaga*, 982 F.2d 408 (10th Cir. 1992), is the only court of appeals case cited by petitioner that did not involve a

Thus, if the district court in this case ultimately rules in the government's favor after a bench trial, petitioner can raise as a claim of error on appeal the contention that he was improperly denied his right to trial by jury. And if the bench trial culminates in a judgment favorable to petitioner, the question whether the district court properly struck petitioner's jury demand will be of no continuing practical importance. Petitioner cites *no* case in which a court of appeals has granted a petition for mandamus relief on the ground that the district court abused its discretion in failing to grant an untimely request for a jury trial.[4]

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direct appeal. In *Nissan*, however, the Tenth Circuit denied the defendant's petition for mandamus relief on the ground that the defendant's "failure to make a timely jury demand was [not] caused by anything other than mere inadvertence." *Id.* at 409.

[4] This Court's decisions granting mandamus relief in *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962) (*Dairy Queen*), and *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959) (*Beacon Theatres*), are not to the contrary. Neither *Dairy Queen* nor *Beacon Theatres* involved an untimely request for a jury trial. Instead, the district courts in both cases decided to try the plaintiffs' equitable claims first and their legal claims second, an approach that would have resulted in the plaintiffs' loss of their right to jury trials on factual issues common to both their equitable and legal claims. In reversing those decisions, this Court held that "only under the most imperative circumstances * * * can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Dairy Queen*, 369 U.S. at 472-473 (quoting *Beacon Theatres*, 359 U.S. at 510-511). The Court therefore found that mandamus relief was warranted. *Beacon Theatres*, 359 U.S. at 511; *Dairy Queen*, 369 U.S. at 479-480. In this case, there is no danger that petitioner's right to a jury trial will be lost if he is required to raise the issue of the district court's denial of his jury demand on direct appeal. If the court of appeals agrees with petitioner that his request was improperly denied, it can reverse the district court's judgment and remand for a new trial, as the Seventh Circuit did in *Merritt*, 697 F.2d at 768.

The denial by the court of appeals of petitioner's request for mandamus relief was proper for the additional reason that petitioner failed to establish that his right to the writ is "clear and indisputable." *Cheney*, 542 U.S. at 381. Petitioner contends that a "widespread circuit conflict" exists on the issue whether a jury demand that is untimely due to oversight or inadvertence may be excused under Rule 39 (Pet. 7-10); that the Ninth Circuit applies a uniquely strict standard (Pet. 12-14); and that his untimely request for a jury trial would have been granted under "*any* of th[e] standards" used by the eleven other courts of appeals (Pet. 4, 15-23). None of those contentions has merit.

No circuit conflict exists on the question whether a district court *may* deny an untimely jury demand that is attributable to the moving party's oversight or inadvertence. To be sure, the Ninth Circuit has gone further than other courts of appeals in explicitly holding that "[a]n untimely request for a jury trial *must* be denied unless some cause beyond mere inadvertence is shown." *Pacific Fisheries*, 239 F.3d at 1002 (emphasis added). Other circuits, however, have uniformly concluded that a district court does not abuse its discretion when it denies a belated request for a jury trial that resulted from the requesting party's oversight or inadvertence. The Eleventh Circuit, for example, has held that "when reviewing a lower court's denial of a belated jury request * * * considerable weight [is given] to the movant's excuse for failing to make a timely jury request. If that failure is due to mere inadvertence on the movant's part, we generally will not reverse the trial court's refusal to grant a 39(b) motion." *Parrott*, 707 F.2d at 1267 (citations omitted). The Sixth Circuit has similarly stated that "a district court will not abuse its discretion in de-

nying a Rule 39(b) motion if the only justification offered for failure to demand a jury trial is mere inadvertence." *Andrews*, 544 F.3d at 632 (citation omitted). The other circuits apply a similar approach. See *Westchester Day Sch.* v. *Village of Mamaroneck*, 504 F.3d 338, 356-357 (2d Cir. 2007) ("[I]nadvertence in failing to make a timely jury demand does not warrant a favorable exercise of discretion under Rule 39(b)."") (citations and quotation marks omitted); *Olympia Express, Inc.* v. *Linee Aeree Italiane, S.P.A.*, 509 F.3d 347, 352 (7th Cir. 2007) ("Rule 39(b) allows the district court to grant an untimely demand for a jury, but only * * * if a good reason for the belated demand is shown.") (citations omitted); *Infinity Group*, 212 F.3d at 195 (noting that, although it is not a "mechanical rule," the Third Circuit "generally den[ies] relief when the only basis for such relief advanced by the requesting party is the inadvertence or oversight of counsel") (citation and quotation marks omitted); *Farias*, 925 F.2d at 873 (under Fifth Circuit law, "[i]t is not an abuse of discretion by a District Judge to deny a Rule 39(b) motion . . . when the failure to make a timely jury demand results from mere inadvertence on the part of the moving party") (citations and quotation marks omitted); *Littlefield*, 614 F.2d at 585 (finding that the district court did not abuse its discretion in denying a Rule 39(b) motion where the movant "offer[ed] no justification for the failure to make an appropriate demand other than inexperience"); *Nissan Motor Corp.* v. *Burciaga*, 982 F.2d 408, 409 (10th Cir. 1992) ("[W]e hold today that it would not be an abuse of discretion to deny relief pursuant to Rule 39(b) when the failure to make a timely jury demand results from nothing more than the mere inadvertence of the moving party.") (citations omitted); *BCCI Holdings*, 214 F.3d at

172 (holding that "mere inadvertence" is a "very weak" justification for a failure to make a timely demand for a jury trial); *General Tire & Rubber Co.* v. *Watkins*, 331 F.2d 192, 197 (4th Cir.) (holding that a district court should grant an untimely jury request only under "exceptional circumstances"), cert. denied, 377 U.S. 952 (1964).

Thus, notwithstanding the varying articulations by the courts of appeals of how the discretion of a district court under Rule 39(b) should be exercised and reviewed, virtually every court of appeals either refuses to excuse inadvertence of counsel under Rule 39(b), or declines to reverse a district court's determination refusing to do so. In this case, the district court concluded that petitioner's failure to make a timely jury demand was "accurately characterized as 'oversight or inadvertence.'" Pet. App. 6. Although the court stated that "existing Ninth Circuit precedent" precluded it from excusing petitioner's untimeliness under Rule 39(b), see *ibid.*, the district court did not suggest that it would have granted such relief if it had possessed the discretion to do so. To the contrary, in denying petitioner's belated request for a jury trial, the court observed that "it is to the benefit of the parties and the court's administration of its docket when the federal rules are fully observed." *Ibid.* As the cases cited above make clear, it is unlikely that any court of appeals would have concluded that the district court abused its discretion in relying on these reasons to deny petitioner's untimely request. Those decisions indicate both that petitioner had no "clear and indisputable" right to mandamus relief, *Cheney*, 542 U.S. at 380-381, and that the denial of

relief here by the court of appeals did not create a circuit conflict warranting this Court's review.[5]

3. Petitioner also argues that the Ninth Circuit's refusal to grant mandamus was "patently erroneous" (Pet. 24) because petitioner's November 9 e-mail attaching a red-lined draft case management plan constituted a written jury demand that was timely filed and served in compliance with Rule 38(b). That argument lacks merit and does not warrant this Court's review.

As the district court correctly explained, "[t]o elevate an informal e-mail exchange of draft case management plans to the status of 'service' does not comport with the technical sense with which that word is used in the Rule." Pet. App. 5.[6] At the very least, petitioner's argument that timely service occurred here is not so obviously correct as to give rise to a "clear and indisputable" right to mandamus relief, and petitioner can raise the issue again on direct appeal if the district court rules in the government's favor after a bench trial. In any event, petitioner's fact-bound contention that the November 9 e-mail constituted "servi[ce]" of a jury demand within

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[5] It is also unlikely that petitioner was entitled to relief under Rule 6(b), even if the rule applies here. As this Court stated in *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), "inadvertence * * * do[es] not usually constitute 'excusable' neglect" under Rule 6. *Id.* at 392.

[6] The district court also suggested (Pet. App. 5, 6) that petitioner's failure to *file* the jury demand within the relevant ten-day period constituted an additional breach of Rule 38(b). As petitioner explains (Pet. 24-25), and as the government acknowledged below (Dkt. No. 28, at 4 n. 2), Rules 38(b)(2) and 5(d) require only that filing must occur within a reasonable time after service. That point is of no consequence, however, because (as the district court correctly determined) petitioner's jury demand was not served on the government within the requisite ten-day period.

the meaning of Rule 38(b) raises no legal issue of broad significance warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 10-469

In The

Supreme Court of the United States

JOHN K. BALDWIN,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE NORTHERN MARIANA ISLANDS,
Respondent.

UNITED STATES OF AMERICA,
Real Party in Interest.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

I. The Government Effectively Concedes That This Case Implicates A Long-Standing and Important Split in the Federal Circuits.

In an attempt to reframe the issue at hand to obscure the circuit split raised by Petitioner, the Government contends that the issue presented here is "whether a district court *may* deny an untimely jury demand that is attributable to the moving party's oversight."[1] It is not. Rather, the issue is what standard should be used to determine if an untimely request for a jury trial should be granted.

In this regard, the Government concedes that the Ninth Circuit has "gone further than other courts of appeals in explicitly holding that '[a]n untimely request for a jury trial *must* by denied unless some cause beyond mere inadvertence is shown.'"[2] In fact, at least thirteen federal courts, beginning in 1972 and continuing up through this year, have identified a multi-circuit split regarding the standard by which a district court should exercise its discretion under Rule 39(b).[3]

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[1] Government's Brief in Opp. ("Opp.") 10 (emphasis in original).

[2] *Id.* (quoting with emphasis added, *Pacific Fisheries Corp v. H.I.H. Cas. & Gen. Ins., Ltd.*, 239 F.3d 1000, 1002 (9th Cir. 2001)).

[3] Pet. 7-9 & n.6.

Under the standard employed in every circuit other than the Ninth, Petitioner's jury demand would almost certainly have been permitted.[4] A district court in the Ninth Circuit, however, has no discretion to excuse an inadvertent jury waiver.[5] Indeed, the Government specifically conceded that the reason the "district court declined to grant petitioner relief . . . [was] the decision of the court of appeals in *Pacific Fisheries Corp.*," which sets forth the Ninth Circuit's uniquely rigid view.[6]

The Government also implicitly concedes the split between the Ninth Circuit (as well as all other circuits), and the Second Circuit. The Second Circuit reads Rule 39(b) in tandem with Rule 6(b), which allows any untimely filing in federal court to be excused if based on "excusable neglect."[7] Accordingly, an untimely jury demand in the Second Circuit may be excused even if based entirely on "neglect" – in direct contradiction to the rule in the Ninth Circuit.[8] Significantly, the Second Circuit's ruling is a direct descendant of this Court's holding in *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380,

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[4] Pet. 17-23.

[5] *Id.*

[6] Opp. 5.

[7] *See* Pet. 15-17 (*discussing Raymond v. IBM Corp.*, 148 F.3d 63 (2d Cir. 1998)). The United States does not dispute the conflict between *Raymond* and the rule in the Ninth Circuit.

[8] *Id.*

387 & n.3 (1993), which rejected the inflexible rule used in several circuits that required something more than inadvertence to excuse an untimely filing under Rule 6(b). If untimely filings of lesser importance than a jury demand can be permitted when mitigating factors favor the extension of such grace,[9] then surely the determination of when to allow an untimely jury demand should be afforded the same or greater solicitude.

There is no factual dispute regarding the specific posture of this case. Petitioner made a formal jury demand which was untimely by only two days.[10] There has been no contention that this delay caused prejudice. Moreover, the formal demand was a follow-up to a jury demand contained in Petitioner's draft case management order, which the Government admits having received *within the deadline for service of a jury demand*.[11] Even if not credited as a sufficiently formal jury demand, the Government's actual receipt of Petitioner's less formal jury demand, via email service (to which it specifically consented), is a factor a district court in any other circuit could have considered.

The Government points to cases in the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth,

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[9] *Id.* (listing factors to be considered).

[10] Pet. 5; Opp. 3.

[11] Opp. 2. Moreover, the Government recognizes that Petitioner prepaid $5 million in taxes to avail himself of a jury trial in district court. Opp. 6.

Eleventh, and DC circuits for the proposition that there is no meaningful circuit split.[12] While the cited cases do generally find no abuse of discretion by lower courts declining to grant Rule 39(b) motions, in each of those cases there were factors militating against granting a Rule 39(b) motion that are not present here. These factors include (1) length of delay of: six months,[13] more than a year,[14] two years,[15] over two years,[16] and as late as two weeks before trial;[17] (2) facts so technical that the court doubted that a

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[12] Opp. 10-12.

[13] *Andrews v. Columbia Gas Transmission Corp.*, 544 F.3d 618, 632 (6th Cir. 2008).

[14] *Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th Cir. 1983); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 356-57 (2d Cir. 2007); *BCCI Holdings (Lux.) S.A. v. Khalil*, 214 F.3d 168, 173 (D.C. Cir. 2000) (hereinafter "*BCCI*"). *Westchester Day* highlights another schism in the case law. There, when Rule 6(b) and *Raymond v. IBM Corp.* were apparently not raised, the court relied upon the holding in *Noonan v. Cunard S.S. Co. Ltd.*, 375 F.2d 69, 70 (2d Cir. 1967) under which, as in the Ninth Circuit, a district court has no discretion to grant an untimely jury demand if the reason for delay was inadvertence.

[15] *Nissan Motor Corp. v. Burciaga*, 982 F.2d 408, 409 (10th Cir. 1992).

[16] *Gen. Tire & Rubber Co. v. Watkins*, 331 F.2d 192, 197-98 (4th Cir. 1964)

[17] *SEC v. Infinity Group Co.*, 212 F.3d 180, 195-96 (3d Cir. 2000).

jury could even "comprehend the complex issues" much less "reach a correct decision;"[18] (3) deliberate tactical delay;[19] (4) completion of discovery and motion deadlines;[20] (5) reliance by the Court and/or the party opposing the motion on having prepared for a bench trial;[21] (6) prejudice to party opposing the motion,[22] and (7) complete failure to make a written jury demand.[23]

Although the ten circuit courts cited by the Government may *allow* district courts to deny a Rule 39(b) motion based in whole or in part on the fact that a jury demand was inadvertently untimely, six of these ten circuit courts *require* district courts to take into consideration other factors.[24] In those circuits, the district courts are either required to grant an untimely demand for a jury "in the absence of compelling reasons to the contrary," or else are required to perform a balancing-test which weighs factors such lack of prejudice to the opposing party,

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[18] *Gen. Tire & Rubber Co.*, 331 F.2d at 197-98.

[19] *Littlefield v. Ft. Dodge Messenger*, 614 F.2d 581, 585 (8th Cir. 1980).

[20] *BCCI*, 214 F.3d at 173.

[21] *Parrott*, 707 F.2d at 1267; *BCCI*, 214 F.3d at 173.

[22] *Andrews*, 544 F.3d at 632; *Infinity Group Co., 213 F.3d at 196*; *BCCI*, 214 F.3d at 173.

[23] *Littlefield*, 614 F.2d at 585.

[24] Pet. 17-20 (discussing standard in the Third, Fourth, Seventh, Eighth, Eleventh and D.C. Circuits).

prejudice to the movant, good faith of the movant, lack of prejudice to the schedule of the court, and the appropriateness of the issues involved for a jury.[25]

The remaining four circuits cited by the Government vest complete discretion in their district courts, enabling them to consider the balancing factors considered in the other circuits.[26] Only in the Ninth Circuit are district courts completely prohibited from exercising discretion to grant an inadvertently untimely jury demand.

II. The Government's Argument that Man-damus Is Not Warranted to Safeguard Petitioner's Right to a Jury Trial Ignores This Court's Holdings in *Dairy Queen* and *Beacon Theatres*.

The Government also argues that the improper denial of Petitioner's right to a jury trial does not need to be corrected on mandamus, because it can be addressed on direct appeal after trial.[27] However, this argument ignores the holdings in *Beacon Theatres, Inc. v. Westover*[28] and *Dairy Queen, Inc. v. Wood*.[29] This Court held in both cases that a court of appeals must grant mandamus to protect the right to a jury

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[25] *Id.*

[26] Pet. 20-22 (discussing standard in First, Fifth, Sixth and Tenth Circuits).

[27] Opp. 6-10.

[28] 359 U.S. 500, 511 (1959).

[29] 369 U.S. 469, 472 (1960).

trial any time "it has been improperly denied,"[30] emphasizing that it is "the *responsibility* of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to a trial by jury."[31]

The result of these holdings has been to grant parties in federal court the right to petition for mandamus, whenever their right to be heard by a jury is at stake. As the Sixth Circuit explained in *National Union*:

> When the [District] Court denied trial by jury, the appellants could have filed an action in mandamus in this Court . . . Had they done [so], they might have obtained the relief they are now seeking and thus they would have avoided the ten days' [bench] trial before the Court.[32]

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[30] *Beacon Theatres*, 359 U.S. at 511.

[31] *Dairy Queen*, 369 U.S. at 472 (emphasis added). As the Government notes (Opp. 6), Petitioner's right to a jury trial is statutory, not constitutional. Rule 38(a) states that the right to a jury trial is to be afforded the same protection *regardless* of whether it is granted directly by the Constitution or by statute.

[32] *National Union Electric Corp. v. Wilson*, 434 F.2d 986, 988 (6th Cir. 1970); *accord In re Jensen*, 946 F.2d 369, 371 (5th Cir. 1991) ("[A] writ of mandamus is an appropriate remedy to protect the valued right of trial by jury and to avoid costly, multiple trials."); *In re Hooker Invs., Inc.*, 937 F.2d 833, 837 (2d Cir. 1991) ("[W]hen an otherwise unappealable order denies a claimed right to a

The Government's reliance on *Cheney v. United States District Court,* 542 U.S. 367 (2004)[33] is misplaced, because *Cheney* did not involve review of the denial of a right to a jury trial. *Beacon Theatres* and *Dairy Queen* establish a different standard when a jury demand is at stake.[34] Indeed, while mandamus ordinarily requires a petitioner to demonstrate that he is clearly entitled to relief, and would be irreparably harmed in its absence, in the context of a jury demand, mandamus is warranted even where the petitioner's right to a jury trial is "debatable,"[35] and even when "irreparable harm could easily have been found wanting."[36]

As explained by the Tenth and D.C. Circuits:

> [E]ven on an application for an extraordinary writ for pre-trial relief the Supreme Court expects the courts of appeals to make a determination whether or not there is a right of trial by jury, regardless of whether the

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jury trial, immediate review may be obtained by way of a petition for mandamus.").

[33] *See* Opp. 6-10.

[34] *Beacon Theatres*, 359 U.S. at 511; *Dairy Queen*, 39 U.S. at 472-473; *accord In re Lockheed Martin Corp.*,503 F.3d 351, 353-54 (4th Cir. 2007); *In re Rhone-Poulenc Roher Inc.*, 51 F3.d 1293. 1303-04 (7th Cir. 1995).

[35] *In re Union Leader Corp.*, 292 F.2d 381, 384 (1st Cir. 1961) (citations omitted).

[36] *In re Sandahl*, 980 F.2d 1118, 1120 (7th Cir. 1992) (citations omitted).

> question is a close or complicated one . . . the Court would not welcome a doctrine whereby a party's constitutional right to jury trial was trammeled in fact because a court of appeals determined that the issue was doubtful. . . .[37]

The right to obtain interlocutory relief through mandamus – whenever a jury trial has been improperly denied – is "firmly settled."[38] As explained by the Third Circuit in *Allegheny,* the courts of appeals are generally – and understandably – reluctant to intervene in district court proceedings through the writ of mandamus, but this Court's holdings have made review of the denial of a jury trial into an exception to this general rule.[39]

The Government ignores this long stream of precedent and attempts to distinguish *Beacon Theatres* and *Dairy Queen,* arguing that these two holdings should not apply outside of their specific

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[37] *Bruce v. Bohanon,* 436 F.2d 733, 735 (10th Cir. 1970) (quotation omitted).

[38] *In re Vorpahl,* 695 F.2d 318, 319 (8th Cir. 1982); *accord Lee Pharms. v. Mishler,* 526 F.2d 1115, 1116 (2d Cir. 1975).

[39] *Allegheny Int'l, Inc. v. Allegheny Ludlum Steel Corp.,* 920 F.2d 1127, 1133-34 (3d Cir. 1990) (Notwithstanding "courts' general reluctance to issue writs of mandamus . . . *Dairy Queen* and *Beacon Theatres* have begotten an impressive progeny.") *(citing Higgins v. Boeing Co.,* 526 F.2d 1004, 1006 (2d Cir. 1975); *Eldredge v. Gourley,* 505 F.2d 769, 770 (3d Cir. 1974); *Mondor,* 910 F.2d at 586; *In re Vorpahl,* 695 F.2d at 319; *In re Zweibon,* 565 F.2d 742, 746 (D.C. Cir. (1977)).

procedural context – the loss of a jury trial by having the court try equitable claims first and establishing facts that would otherwise be found by a jury.[40] As if in contrast, the Government states "[i]n *this* case there is no danger that Petitioner's right to a jury trial will be lost if he is required to raise the issue of the district court's denial of his jury demand on direct appeal[.]"[41] However, the same could have been said of the jury right at issue in *Dairy Queen* and *Beacon Theatres*.[42] Petitioner has not found, and the Government has not cited, a *single* case suggesting that this Court's holdings should not apply in this particular context.[43] In fact, this Court has

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[40] Opp. 9 n.4.

[41] Opp. 9 n.4 (emphasis added).

[42] *In re Rhone-Poulenc Roher Inc.*, 51 F3.d 1293, 1303-04 (7th Cir. 1995)(noting that fact that in *Beacons Theatres* a new jury trial could have been ordered on direct appeal did not prevent the Court from granting the writ because when mandamus used to protect right to jury trial, strict compliance with usual standards for obtaining writ excused).

[43] The Government challenges Petitioner to cite a single case in which mandamus was granted to reverse a district court's decision to strike an untimely jury demand. Opp. 9. As set forth herein, there are many cases granting mandamus to remedy a wrongfully denied jury trial, and one such case specifically dealing with an allegedly untimely jury demand is *Higgins*, 526 F.2d at 1006 (after untimely jury demand was stricken by district court, court of appeals granted mandamus and reversed, holding that "[o]ur power to preserve the important right to a trial by jury by mandamus is clear.").

reaffirmed its holding in *Beacon Theatres* and observed that it applies in any procedural context in which the right to a jury trial has been denied.[44]

There is no reason for the Court to revisit its holdings on the appropriateness of mandamus where a jury trial has been erroneously denied. Its previous holdings on this issue have been repeatedly applied by the courts of appeals for half a century. Accordingly, this Court should grant certiorari to address the deep circuit split identified in the Petition and, if it is found that Petitioner's right to a jury trial was wrongfully denied, reverse the Ninth Circuit's decision to deny mandamus.[45]

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[44] *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 288 n.13 (1988).

[45] The rulings in *Beacon Theaters* and *Dairy Queen* are a necessary corollary of the consequences of the wrongful refusal to afford a party a jury trial, the harm from which is not correctable on direct appeal. Among other irremediable harms, evidentiary rulings in a bench trial are likely to be very different than in a jury trial, but once evidence is in the record of the bench trial, the likelihood of its use in a subsequent jury trial increases. Settlement considerations are also affected by whether a case is to be tried to the bench or a jury.

III. The District Court's Determination That A Draft Case Management Plan Containing A Jury Demand Is Not a Document Capable Of Being Served Is So Obviously Erroneous as to Give Rise to A Clear and Undisputable Right to Mandamus Relief.

In even the last ten years, the means of service and filing have radically changed in the federal courts.[46] The vast majority of local rules require lawyers to register for e-filing and consent to email service at specified email addresses, as did the Government's lawyers here,[47] making insistence on "more formal" service anachronistic.

This Court should take the opportunity to disabuse courts of any lingering prejudice against email service, particularly in cases like this one, in which there is no dispute that the jury demand at issue was actually received and read by lawyers who had specifically consented to such service. To allow the Government to thwart the Petitioner's jury right by questioning the "formality" of Petitioner's emailed jury demand, contained in a draft case management order – a document routinely served and filed – would be to raise form over substance.[48]

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[46] *See* Fed. R. Civ. P. 5(b)(2)(E) (authorizing electronic service).

[47] Pet. 27 n.50; App. 41.

[48] The Government has presented no authority to counter the common-sense rulings of the cases cited by Petitioner (Pet. 26 n.47) to the effect that a draft case management order asserting a right to a jury trial is a

Ironically, it is the Ninth Circuit that best articulates the need for common sense and flexibility in this regard. Because the "right of jury trial is fundamental," courts are required to "indulge every reasonable presumption against waiver."[49] All that is required is that:

> the jury demand be sufficiently clear to alert a careful reader that a jury trial is requested on an issue. This approach ***allows a great deal of flexibility in how the request is made***, and so comports with [this Court's] presumption against waiver, while still recognizing that the purpose of RULE 38's demand requirement is to inform the court and counsel well in advance of trial as to the trial method desired.[50]

Accordingly, it is "clear and undisputable" that Petitioner is being deprived of a jury trial to which he is entitled, making mandamus relief both necessary and appropriate.

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cognizable jury demand when served. Opp. 13.

[49] *Lutz v. Glendale Union High Sch.* 403 F.3d 1061, 1064 (9th Cir. 2005) (citing *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)).

[50] *Lutz*, 403 F.3d at 1064-65 (quotation omitted and emphasis added).

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the Court grant certiorari on the questions presented.

Respectfully submitted,

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